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THE ACQUISITION  
AND GOVERNMENT OF  
BACKWARD TERRITORY



THE ACQUISITION  
AND GOVERNMENT OF  
BACKWARD TERRITORY  
IN INTERNATIONAL LAW

BEING A TREATISE ON THE LAW AND PRACTICE  
RELATING TO COLONIAL EXPANSION

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## PREFACE

THE term 'Backward Territory' is not one that is known to International Law, nor is it possible or desirable to give it any exact definition or denotation for our present purpose. At the one extreme, it may perhaps be said to be marked by territory which is entirely uninhabited ; and it clearly includes territory uninhabited by natives as low in the scale of civilization as those of Central Africa. On the other hand, all that can be said as to its upper limits probably is that it is obviously intended to exclude territory which has reached the level of what is sometimes known as European or Western civilization.

The term is a relative one, and as civilization advances it may cease to apply to territory which would to-day be said to be included within it ; or it may conceivably become applicable to countries which would not, in the circumstances of the present time, be called ' backward.'

The advanced States have, from time to time, acquired the entire or partial sovereignty over territory exhibiting very varied degrees of backwardness. Before the War, there was discernible a tendency, which has now abated, to extend this process to countries comparatively high in the scale of civilization. International Law has followed, and must continue to follow, such movements.

The problems which arise to-day are not in all respects the same as those which had to be solved in the earlier periods of colonial expansion. New methods of acquisition have been introduced to meet the altered conditions. Some rules, such as those connected with Discovery, have sunk into the background ; others, for instance those concerned with the acquisition of a part only of the sovereignty, have been brought from an obscure position into the foreground. New rules have been framed. Yet old rules have been retained, developed, and adapted to new situations ; and for a proper understanding of

the law of to-day & knowledge of its growth since the end of the Middle Ages is essential.

But it is not necessary to deal with the past merely in order to show how the present rules have grown up. The contention, which has been put forward in Arbitration Proceedings, that titles which had their beginnings in past ages must be judged to-day according to the law as it existed at those times, is probably not universally sound—it is sufficient in this connection to refer here to the extended scope which has been given to the doctrine of Effective Occupation in modern times. But such a principle is frequently the right one to apply. For example, the Hague Tribunal in its Award, given in 1909, in the matter of the maritime frontier between Norway and Sweden, held that the question was to be considered in connection with the principles of law in force in 1658; and in disputes as to territorial titles it is sometimes necessary to know which State was pointed out by the law of a particular time as having the best claim to certain territory at that time.

Some of the questions which will be considered in the following pages are of particular interest as showing how International Law develops, and develops not only to meet changing political conditions but also in response to an advancing public opinion. For example, while some of the rules which will be considered in Part IV are already rules of law, others cannot yet be said to be supported by legal sanctions, although they are being so generally followed that any departure from them would be visited with the censure of public opinion. They are of moral if not, at the moment, of legal force. They represent International Law in the making. Moreover, many of these rules have regard to races which cannot be said to be Subjects of International Law, but whose welfare is becoming so increasingly the concern of the advanced peoples who constitute the International Family that those peoples are making the protection of the backward races the subject of legal rules which are binding upon and between themselves.

A few observations will be fitting with regard to the relative values of the different kinds of evidence that will be marshalled in the following pages for or against a proposition as a rule of International Law.

That Law 'rests upon a consensus of civilized States'; but it is only in a few instances, such as in the Final Act of the

Berlin Conference, that the assent of those States has been formally given to particular rules. Hence recourse must be had, as Lord Alverstone, C.J., pointed out in *West Rand Central Gold Mining Co., Ltd. v. The King*, to 'evidence of usage to be obtained from the action of nations in similar cases in the course of their history.'

'Les règles du droit,' said the French Minister for Foreign Affairs in the Chamber of Deputies on the 20th June, 1896, 'ne sont, en somme, que la synthèse de l'expérience des faits.' And the Arbitrators of The Hague Court in the case of the Muscat Dhows sought for principles of International Law, 'dans les Conventions en vigueur à cette époque, dans la législation nationale en tant qu'elle a obtenu une reconnaissance internationale et dans la pratique du droit des gens.'

In the following discussion, considerable attention has, accordingly, been given to the actions of States, and to rules that have been advanced officially on behalf of States.

Special importance has also been attached to the decisions of arbitrators and judges, whose business it is to ascertain, by the appropriate tests, what the law is in order to apply it in practice.

The opinions of jurists have been freely cited, especially those of the classical jurists.

Lord Alverstone, in the case to which we have referred, laid down that the mere opinions of jurists, however eminent or learned, are not in themselves sufficient to show that a particular proposition is binding as a rule of International Law, although he acknowledged that such opinions 'have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged.' In *R. v. Keyn*, more authority was allowed by some of the members of the Court to the writings of jurists, which were considered to afford 'evidence of the agreement of nations.' 'To ascertain that law,' said Amphlett, J.A., 'it is most important in this and all other cases to consult the published opinions of eminent jurists of different countries, for although, as has been justly said, those writers cannot make the law, still if there is found a practical unanimity or a great preponderance of opinion among them, it would afford weighty, and in many cases, conclusive evidence that their statement of the law had been received with the general consent of the civilized nations of the world.' 'Both sides, therefore,' he added, 'very properly called our attention

to the opinions of almost every accredited writer on international law who has dealt with this question of maritime territory.'

The Supreme Court of the United States has also held, in *The Paquete Habana*, that the works of jurists and commentators may be resorted to by judicial tribunals, 'not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is'; while in some other countries even greater weight is allowed to the views of writers upon International Law. The Statute establishing the Permanent Court of International Justice provides that the Court shall apply, in addition to international conventions, international custom, and recognized principles of law, 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.' Moreover, the 'Cases' and 'Arguments' of the Parties to an International Arbitration are usually fortified by references to the writings of authors of repute.

The book has grown out of the work I did while I held the King Edward VII Memorial Scholarship at the Middle Temple.

I am indebted to the Carnegie Endowment for International Peace for examining and criticizing the manuscript, and for placing a large advance order for copies of the book.

M. F. L.

December, 1925.

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# THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW

## PART I.

### THE TERRITORY.

#### CHAPTER I.

##### SCOPE AND PURPOSE OF PART I.

INTERNATIONAL LAW places no veto on the acquisition of territory merely on account of its relative backwardness or advancement. It does, however, prescribe the mode or modes of acquisition which must be employed, according to the condition of the territory, if a valid title to it is to be obtained. The lines of division that are of importance for our purpose are not, therefore, those which might be considered to separate backward from advanced territory. They are rather those internal lines which subdivide backward territory according to the method or methods by which it can be validly acquired.

Now, the area under the dominion of a particular Sovereign is liable to variation by :

(a) Transference of territory from, or to, another Sovereign ;  
and

(b) Transference of territory from, or to, the no-Sovereign's-land or *territorium nullius*.

The methods known to International Law by which these changes can be brought about may be summarized as follows :

Transference from one Sovereign to another may be effected by ;—

The Area  
of a  
Sovereign's  
Territory  
may be  
varied by :

**Cession.** (1) Cession, whether made freely or under compulsion as after a war ;

**Conquest.** (2) Conquest, or the acquisition, by a successful belligerent, of the territory of which he has taken possession during a war ;

**Prescription.** (3) Prescription, or the perfection of the title of a Sovereign to territory, due to that territory's having remained under his continuous and undisturbed dominion during a period sufficient to justify the assumption that the position has become part of the established international order ; and we should perhaps add

(4) Relinquishment for administration under League of Nations mandate, although this mode would seem to be only a special case of Cession.

**Relinquishment for administration under Mandate.** Territory which is *territorium nullius* may pass under the dominion of a Sovereign by ;—

**Occupation.** (1) Occupation, which is the normal process for the assumption of sovereignty over a part of the *territorium nullius* ; and

**Accretion.** (2) Accretion, where, by a physical change, the land area under a particular Sovereign is increased, artificially or naturally, so as to extend the boundaries of the Sovereign's territory over part of the open sea.

Transference of territory under a Sovereign to the *territorium nullius* may take place by ;—

**Abandonment.** (1) Abandonment, i.e. when a Sovereign voluntarily relinquishes part of his territory ;

**Forfeiture.** (2) Forfeiture, which occurs when a Sovereign loses his title to territory on account of failure to occupy that territory effectively ; and

**Destruction of land.** (3) Destruction or disappearance of land whereby the extent of the open sea is increased.

Cession is necessarily a bilateral act ; it requires the consent of the ceding as well as of the acquiring Sovereign. Conquest denotes that the territory has been seized by force against the will of its previous Sovereign. Prescription demands long possession. Occupation, on the other hand, can be commenced by a unilateral act of a relatively simple nature and consummated in a comparatively short time.

It is, therefore, important to determine what are the conditions that characterize territory that is open to acquisition by Occupation.

**Occupation is applicable to sovereignty** It may be here remarked that Occupation in the broad sense covers not only the process or mode by which sovereignty is extended over a territory that was previously without a Sovereign, but also that by which ownership is acquired in land

or goods previously belonging to nobody. The sovereignty over a given territory must, therefore, be distinguished from the property in the land composing it, and in considering what constitutes occupiable territory we shall be concerned only with the sovereignty.

Dealing first with land, we shall consider what are the characteristic marks of *territorium nullius*, and we shall deal with Abandonment and Forfeiture as being processes by which territory can be added to the *territorium nullius*. We shall then inquire to what extent the sea is *territorium nullius* and how far it is open to acquisition; and we shall deal with Accretion in so far as that process functions as an agent for rendering parts of the open sea susceptible of sovereignty. Lastly, we shall consider whether, apart from proscribing the appropriate mode of acquisition in the various cases, International Law places any veto upon particular acquisitions, either generally or as against particular States.

and  
property.  
Gains II.66.  
Dig. 41. 1.3.  
Sovereign-  
ty only to  
be dealt  
with.

The sea.

## CHAPTER II

### UNINHABITED LANDS.

#### The Arctic and Antarctic Regions.

*The Times*, Jan. 21, 1924, June 16, 1925.  
Waultrin; *Rev. Gen. de Dr. Int. Public*, XV, p. 78 sq.

THE parts of the earth in which are to be found the most important uninhabited areas that remain open to acquisition as *territoria nullius* are the Arctic and the Antarctic. Interest in these regions has recently developed with the recognition of the value of the whale, seal, and other fisheries, and of the scientific possibilities of those regions, and owing to the possible existence there of mineral-bearing lands. It has also been suggested that parts of these regions might be made to serve strategic purposes, and that aircraft bases might be formed there.

‘Hinterland’ and ‘claims,’ Waultrin *op. cit.* *The Times*, July 24, 1925.  
*Nature*, Aug. 29, 1925.  
The Arctic.

Claims based on a kind of ‘hinterland’ theory have been put forward, on behalf of some of the most northerly and most southerly countries, to any land that may be discovered within the sectors lying between those respective countries and the Poles, and bounded laterally by the meridians of longitude which bound the countries themselves.

15-16 Geo. V. Ch. 48.  
*The Times*, June 3, 1925, & 18, 1925.

In accordance with this principle, claims have been made on behalf of Canada to all the land contained within a sector included between the meridians of 60° and 141° West longitude, and extending from Canada to the North Pole. The Canadian Parliament has, in fact, recently passed an amendment to the North-west Territories Act under which scientists or explorers proceeding to the Northern hinterland of Canada may be required to obtain Canadian licences; the object of this amendment being explained by the Minister of the Interior to be the assertion of Canadian ownership over the whole Northern Archipelago, as against any other States whose subjects might discover islands in that region.

Claims have also been put forward by Russia in respect of the region north of Siberia; and the principle, if followed, would give the United States the right to any land that might

be discovered north of Alaska between 141° and 170° W., would entitle Russia to any such lands north of Siberia between 170° W. and 82° E., Norway to lands between 82° E. and 5° E., and Denmark to lands north of Greenland.

Those who uphold this principle are able to point out that the recent attribution to Norway of the Spitsbergen Archipelago accords with it, since those Islands are situated within what would be the Norwegian sector. This Archipelago, although not strictly uninhabited, contains only a relatively small and fluctuating non-native population. Since its discovery (or rediscovery) by the Dutch in 1596, claims to the Archipelago have been made by Holland, Great Britain, Denmark, and Norway, but have not been substantiated; and proposals that were put forward just before the Great War for the international control of the Islands by the countries interested in the exploitation of their mineral wealth also came to nothing. The Archipelago thus remained *territorium nullius* until 1920, when Norwegian sovereignty over it was, subject to certain conditions, recognized by a Treaty between the Powers mainly concerned.

On the hinterland principle, Wrangol Island would fall within the Russian sector. This island was discovered by a British officer in 1849, and was occupied for six months by a shipwrecked British crew in 1914, and by British expeditions in 1921 and 1923. The British and Canadian Governments have, however, disclaimed any intention of annexing the Island; but claims to it have been made on behalf of the United States.

In the Antarctic, the hinterland principle has been invoked on behalf of the claim of Australia to Adelie Land, as against the claim of France based upon the discovery of this portion of the supposed Antarctic continent by a Frenchman in 1840. It is pointed out, in support of the Australian claim, that the principle can be said to be already operative in the Antarctic, since Graham Land is a dependency of the Falkland Islands, while the coasts of the Ross Sea and the adjacent islands are administered by New Zealand.

There is no doubt a good deal to be said in favour of the reasonableness and convenience of the hinterland principle as applied to the Polar regions, but, as we shall see in a later Chapter, it probably at present cannot be said to be a rule of law; and in view of the possibility of disputes arising as to the ownership of any lands that may be discovered in the Polar

**Spits-  
bergen.**  
F.O. Hand-  
book No. 36.  
Waultrin  
op. cit.  
113 S.P. 789.  
Cmd. 2092  
(1924).

**Wrangol  
Island.**  
*The Times*, Sept.  
2, 8, & 20, & Oct.  
9, 1923.  
*The Times*,  
June 3, 1925.  
Douglas: U.S.  
Geological Sur-  
vey, Bulletin  
689, p. 46.

**The  
Antarctic.**

**The Polar  
Hinterland  
principle  
not a rule  
of law.**  
Ch. XXIV  
(4) (iv)  
*below.*

regions, an international agreement as to the principles that should govern such a case seems to be desirable.

The learned editor of the eighth edition of Hall's 'International Law' suggests that neither the North nor the South Polar region is susceptible of acquisition by occupation because neither is capable of permanent settlement. But if portions of those regions can be put to any useful purpose, there would appear to be no reason in law why a State which is prepared to adapt them for that purpose should not appropriate such portions, provided it is able to exercise reasonable control over such persons as may be stationed there or may resort there from time to time.

See Ch.  
XIX. below.

The  
Poles.  
Amundsen:  
The South  
Pole, II. 122.

As regards the Poles themselves, in 1911 the Norwegian flag was, in fact, planted at the South Pole by Amundsen, who named the surrounding plain King Haakon VII.'s Plateau. But no formal annexation seems to have been made by the Norwegian Government; nor does the United States Government appear to have made any territorial claims in consequence of Peary's successful expedition to the North Pole in 1909. Indeed, it is difficult to see what useful purpose any appropriation of the areas at or near the Poles could be made to serve.

### Islands in the Sea.

The uninhabited territories which, in the past, have been occupied as *territoria nullius* have frequently been islands in the sea. As examples of many such islands, we mention the following:

F.O. Hand-  
book, No.  
118.

Colonial  
Office List,  
1925, p. 337.

F.O. Hand-  
book, No.  
138.

Islands  
used for  
guano  
collection, etc.  
Colonial  
Office List,  
1925, p. 496.  
F.O. Hand-  
book, No.  
144.

Madeira and the Azores, discovered and settled by the Portuguese in the first half of the fifteenth century.

St. Helena, discovered by the Portuguese in 1502. They made no permanent settlement there, however, and kept the island secret until 1588, when it was visited by Cavendish.

Kerguelen in the southern Indian Ocean, which was discovered and taken possession of in 1772 by the French, whose claims were reasserted in 1893.

But an island may be uninhabited and yet under the sovereignty of a State. Thus there are a number of islands and rocks throughout the world which have no permanent inhabitants, but are British territory or under British protection, and have been leased by the Government for guano collection or for coconut planting. For example, Amboyna Cay and Sprattley Island, two uninhabited sandbanks in the middle of the China

Sea, were annexed by Great Britain in 1877 and leased for guano collection.

At one time, similar leases of islands in the Pacific Ocean were granted by the British Government without annexation. The leases were for terms of years; and they provided expressly that British protection might be withdrawn from the lessee in the event of international complications arising, and that at the end of the term the island should again become no-man's-land. Thus uninhabited Christmas Island was leased in 1865 and again in 1872, but was not formally annexed until 1888. While these islands were, no doubt, not British territory before annexation, it would seem that the grant of the leases amounted to the exercise of a partial sovereignty which was good as against any State that could not show a prior title.

According to the law of the United States, whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other Government, and not occupied by the citizens of any other Government, and takes peaceable possession thereof in the name of the United States, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States, and the discoverer may be granted the exclusive right of occupying it for the purpose of obtaining guano. All acts done or offences committed there are deemed to have been done or committed on the high seas on board a merchant ship of the United States; and it is provided that the United States need not retain possession of the place after the guano has been removed.

An uninhabited island within territorial waters is under the dominion of the Sovereign of the adjoining mainland. Not only the sovereignty over, but also the property in, certain islands which arose from the sea within the territorial waters of the Indian Empire were held by the Judicial Committee of the Privy Council in 1916 to belong to the Crown.

Even where the island is not in the territorial belt, but has been formed by alluvium, it is regarded as belonging to the adjoining land from which its elements were derived. This was laid down by Sir William Scott (afterwards Lord Stowell) in the case of *The Anna* (1805), and although the judgment does not mention the distance of the islands from the mainland, the decision does not depend upon this distance, and, as a matter of fact, some of them seem to have been outside the territorial belt. The point at issue was whether a capture had taken place

*The Times*,  
Apr. 23,  
1888.

See Ch.  
XIX. below.

See F.O.  
Handbook,  
No. 144,  
p. 38.

Moore's  
Digest I.  
666 *sq.*  
Douglas;  
U.S. Geo-  
logical  
Survey;  
Bulletin  
689, p. 44.

Islands in territorial waters.

See Putendorf  
IV. VI. IV. and  
the Bulama Ar-  
bitration, 61  
S.F. 1108.

See, of State for  
India in Council  
7. Chelkani  
Bama Rao &  
others, 43 Indian  
Appeals 192.

Islands formed  
by alluvium.  
5 Robinson's  
Reps. at 386,  
o & d.  
Hall II. II.  
(*note*).

within territorial waters, and the judgment deals with the ownership of the islands in the following terms :

The capture was made, it seems, at the mouth of the river Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is *terraræ dominium finitur, ubi finitur armorum vis*, and since the introduction of fire arms, that distance has usually been recognized to be about three miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the River, which form a kind of portico to the main land. It is contended that these are not to be considered as any part of the territory of *America*, that they are a sort of '*no mans land*,' not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds nests. It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on made land by the former *Spanish* possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from those islands; and that they are the natural appendages of the coast on which they border, and from which indeed they were formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, & vicino prædio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the main land, and as comprized within the bounds of territory. If they do not belong to the United States of *America*, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of *America*! It is physically possible at least that they might be so occupied by *European* nations, and then the command of the River would be no longer in *America*, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of *America*. Whether they are composed of earth or solid rock will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

I am of opinion that the right of territory is to be reckoned from those islands.

Islands  
partly in  
territorial  
waters.

Westlake supposes the case of an island partly within and partly outside the territorial belt, and is of the opinion that if the acquisition of an original title to it came into question, it

would be difficult to contend that such a title could be gained to any part of it otherwise than by effective occupation.' It is submitted that, on the principles underlying the existence of the territorial belt, to be dealt with in Chapter VII, the part of the island within the belt should be regarded as belonging to the adjacent mainland, the occupant of which would also have, for a reasonable time, a contingent right, to be perfected by effective occupation, to the rest of the island.

Westlake,  
I. Ch. V.

## CHAPTER III.

### INHABITED LANDS: THEORETICAL.

Roman  
Law.

Just Inst.  
II, I, 12 sq.  
Ihg. 41. I. 3

THE Roman law of Occupation deals only with the acquisition of property or *dominium*. It lays down that natural law gives to the first occupant *quod ante nullius est*, such as wild beasts, birds and fishes; swarming bees; things taken from an enemy; precious stones, gems, and other things found by the seashore; an island formed in the sea; treasure trove; and things abandoned by their owners. The theory of Occupation was not, however, applied by the Romans to the acquisition of sovereignty or *imperium*.

Ancient  
Law,  
Ch. VIII.  
See also  
Int. Law,  
Lect. IV.

See Pollock  
on Maine's  
Ancient  
Law,  
Ch. VIII.,  
note O.

Maine goes too far when he states that the Roman principle of Occupancy, and the rules into which the juriconsults expanded it, are the source of all modern International Law on the acquisition of sovereign rights in newly discovered countries.

The principles underlying the rules which the Romans found adequate for regulating the acquisition of property in *res nullius* are comparatively simple, and they are quite unequal to the task of settling any but the most general questions that arise in connection with rival claims to sovereignty over large tracts of territory.

When we apply these principles to the acquisition of sovereignty and endeavour to get from them a definition of *territorium nullius*, all they tell us is that, where a tract of territory is not subject to any sovereignty—either because it has never been so subject, or, having once been in that condition, has been abandoned—the sovereignty over it is open to acquisition by a process analogous to that by which property can be acquired in an ownerless thing. But a rule so stated does not carry us far in practice. Its application is clear and universally admitted to the case of uninhabited territory not under any sovereignty. But when we are dealing with inhabited lands such a rule is of little use, because the point at issue is whether, having regard to the degree of political development and other characteristics of the inhabitants, the territory can be considered to be already

under an effective sovereignty, and with this the Roman rules do not deal.

Until comparatively recent times, the acquisition of sovereignty over the territories of backward peoples was discussed as a case of Conquest, not as one of Occupation. The subject formed part of the wider question, whether it was just to levy war against infidels and pagans as such, which was vigorously debated in the Middle Ages by jurists and theologians over a long period. The general trend of opinion was in the direction of denying sovereign rights to non-Christians, but, even among those who held this view, it was put forward as legitimizing a war of Conquest and not as rendering the lands of non-Christians *territoria nullius* which could be acquired by Occupation.

Opinion in the Middle Ages.

Nys.  
Ch. VII.

But the opinion that sovereignty might be justly exercised by infidels received considerable support, and included among its advocates men of high position and authority. St. Thomas Aquinas (1227-1274) taught that dominion is based upon human law, whereas the distinction between the faithful and infidels comes from divine law, and divine law, which comes from grace, does not annul human law, which comes from natural reason; and his contemporary, Sinibaldo Fiesco, afterwards Pope Innocent IV., also declared in favour of the rights of infidels.

Summa.  
Sec. Secus  
Q. 10,  
Art. 10.

Nys, u.s.

The contrary opinion derived support from the principles advocated by Wycliffe. It was condemned at the Council of Constance (1414-1418), where it was discussed in relation to the Poles and Lithuanians. But it was still widely held when the discoveries of the fifteenth and sixteenth centuries again rendered it a question of practical importance.

Turning to the opinions of publicists who have taken up the subject since that time, we find that they can be grouped into three more or less definite classes, as follows:

Opinions of later Publicists

Class (I).—Those who regard backward races as possessing a title to the sovereignty over the territory they inhabit which is good as against more highly civilized peoples.

arranged in three classes.

Class (II).—Those who admit such a title in the natives, but only with restrictions or under conditions.

Class (III).—Those who do not consider that the natives possess rights of such a nature as to be a bar to the assumption of sovereignty over them by more highly civilized peoples.

Having regard to the divergencies of view exhibited, it is desirable to refer to the chief writers in each class in some detail.

## (I) Publicists who recognize Sovereignty in Backward Peoples.

Dealing with Class (I), we will notice first the opinions of a group of Spanish publicists of the sixteenth century who looked at the question particularly in the light of the claim made by Spain to the New World. It is clear that they did not regard those lands, although their inhabitants were savages, as acquirable by Occupation. The question that presented itself to them was whether the Spaniards had a just right to conquer those territories.

Victoria.  
Walker,  
§§ 120 sq.  
Salomon,  
§§ 14 sq.

Thus Franciscus a Victoria, Professor at Salamanca, writing in the first half of the sixteenth century, maintained that the continent of America upon its discovery was not *territorium nullius* because the Indians were the veritable owners, private and public, of their lands; and the Spaniards acquired by their discovery no further title to the lands of the barbarians than would have accrued to the barbarians had they discovered Spain. The fact that they may have been sinners or infidels did not prevent them from being veritable owners in the same way as Christians, and their rejection of the Christian faith after it had been preached to them did not give the Spaniards a right to occupy their lands.

But Victoria taught that, if the Indians hindered the preaching of the Gospel, or obstinately refused the Spaniards such natural rights as the right to trade with them and to journey in their lands, then the Spaniards, as a last resort, had against the Indians all the rights of war, and might take possession of their lands. He suggested with hesitation that, if the Indians were not capable of forming a State, then, in their own interests, the King of Spain might acquire sovereignty over them in order to raise them in the scale of civilization, treating them charitably and not for his personal profit.

Soto.  
Mackintosh,  
*Ethical Philosophy*, 66 sq.  
Nye, Ch. VII.

Victoria was worthily followed by his pupil Dominic Soto, Confessor of Charles V., who held that 'there can be no difference between Christians and Pagans, for the law of nations is equal to all nations.'

Las Casas.  
Mackin-  
tosh u.s.

Again, Las Casas, jurist and missionary and a noble champion of the American Indians, at a conference before Charles V. in 1542, maintained that the conquest of the Indies from the natives was unlawful, tyrannical, and unjust, in opposition to Dr. Sepulveda who contended, on behalf of the Spanish colonists, that the conquest of the Spaniards was lawful.

Ayala, another Spaniard, writing some forty years later, laid down clearly that infidelity was not a sufficient reason for levying war against the unbelievers and depriving them of their dominion, because sovereignty over the earth was not given originally to the faithful alone but to every reasonable creature.

Nor was a different view prevalent outside Spain with regard to the *mode* by which the territory of infidels might be acquired. By the publicists in other countries, Conquest was also considered to be the process proper to such an acquisition, although a difference of opinion still existed as to whether the acquisition was just.

Conrad Brunus (Germany, 1548) considered that wars by which the lands of infidels were to be acquired were just if they were undertaken to recover dominions that might be useful to Christendom.

Gentilis (Oxford, 1588) considered that the title of the Spaniards resulted from a war, which would have been a just war had it been waged because the natives refused to trade with them. But commerce, in his opinion, could not be said to be denied when only certain departments of commerce were closed to foreigners, but only when all commerce was denied; and the Spaniards fought, not in order to enforce commerce, but to get dominion. He apparently did not agree with the principle that the discovery of hitherto unknown lands carried with it the right to occupy them.

Selden, writing in 1618, although his work was not published until 1685, also regarded the Spanish acquisitions as Conquests. He even went further than Victoria and Gentilis, and maintained that the denial of commerce would not, by itself, be sufficient to justify the Conquests.

In 'Mare Liberum' (1609), Grotius followed Victoria in maintaining that the Spaniards had no right to take the Indians' territory:

*Præterea inventio nihil juris tribuit, nisi in ea quæ ante inventionem nullius fuerant. Atqui Indi, cum ad eos Lusitani venerunt, etsi partim idololatæ, partim Mahumetani erant, gravibusque peccatis involuti, nihilominus publice atque privatim rerum possessionumque suarum dominium habuerunt, quod illis sine justa causa eripi non potuit. . . . Imo credere infideles non esse rerum suarum dominos, hæreticum est: et res ab illis possessas illis ob hoc ipsum eripere furtum est, et rapina, non minus quam si idem fiat Christianis.*

From one part of 'De jure belli et pacis' (1625), it might appear that Grotius held the view that the sovereignty over

Ayala.

Hallam, II.  
IV. 89.

Brunus.  
Taylor, § 40.  
Nyn,  
Ch. VII.

Gentilis.  
*De jure  
belli* I. xix

Selden.  
*Mare  
Clausum*  
Ch. XX.

Grotius.  
Cap. II.

- II. III. inhabited lands could be acquired by Occupation, for he says  
IV. that not only the ownership but also the lordship is occupiable,  
and he further explains that lordship has subject to it both  
II. IX. I people and territory. But later on he states that governments  
are not occupiable; and when he comes to the question whether  
discovery gives a valid claim to inhabited lands, he considers  
II. XXII. it from the point of view of a cause of war, and holds that it does  
IX. & X. not furnish a just cause.

That Grotius did not intend to convey the idea that sovereignty can be acquired over inhabited lands by Occupation is maintained by Pufendorf (1672), who says that

- VII. VII. When Grotius . . . tells us that of things which properly  
III. belong to nobody two are capable of seizure, sovereignty and property, we must not understand the word sovereignty in the strict sense, for such as is exercised over men, but for a sovereignty over lands.

- Pufendorf. Pufendorf regarded 'some desolate region encompassed  
IV. VI. with certain bounds either by nature or by human appointment'  
III. & IV. as the kind of territory the seizure of which conferred on the community dominion over all things contained within it. But the violent seizure of occupied lands should not be termed Occupation:

- VII. VII. The way of acquiring sovereignty by violence is usually termed  
III. Occupation or seizure; which yet we must observe to be different from that by which we lay hold on things that want a proprietor, and thus make them our own. For since, in things of this kind, there is no inherent right, which might cause them to belong rather to one man than to another (except the determination of civil laws) hence to obtain the property of them there is no need of a particular title . . . but since every man is, by nature, equal to every man, and consequently not subject to the dominion of others, therefore this bare seizing by force is not enough to found a lawful sovereignty over men, but must be attended with some other title.

- Günther. Günthor (1778) and Klüber (1819) laid down that no nation  
Klüber. is authorized by its qualities, whatever they are, notably not  
Klüber. by a higher degree of culture, to take from another nation its  
§ 195A. property, even from savages or nomads.

- Black- Sir William Blackstone, in his 'Commentaries on the Laws  
stone. of England' (1765), limited the right of Occupancy to lands  
I. 106-7. which are desert and uncultivated; cultivated lands being obtainable only by Conquest or Cession. He regarded the American plantations as having been obtained either by right

of Conquest and driving out the natives ('with what natural justice I shall not at present enquire') or by treaties.

Heffter (Germany, 1844) maintained that Occupation does not extend to persons, and that no power on earth has the right to impose its laws upon roving or savage peoples. He qualified this rule only so far as to admit that, if the preservation and development of the human race is jeopardized by exclusion from any area, then the nations can join together to remove the obstruction. Heffter.  
§ 70.

Pasquale Fiore (Italy, 1868) also contended for the right of sovereignty of savage peoples, whatever their degree of barbarism. He would allow other nations to found establishments in order to exploit such parts of the land as the savages are not using, but such a nation would not thereby acquire sovereignty over the natives, nor the right to exclude other nations from similarly making use of unexploited lands. Pasquale  
Fiore.  
I. II. IV.  
(p. 379).

According to Woolsey (United States, 1874), the claim to territorial sovereignty on the ground of discovery 'was good only against those who acknowledged such right of discovery, but not against the natives.' Woolsey.  
§ 63.

In France there have been, in comparatively recent times, a number of writers who have declared in favour of the full right of the natives to their territories. The positions taken up by some of these writers are given in the following quotations from their works.

Pradier-Fodéré denies the right of Christians on any pretext, even that of a higher degree of culture, to take countries effectively occupied by less civilized peoples though they may be savages. Pradier-  
Fodéré.  
On Vattel,  
§ 209.

Salomon, while refraining from giving a definition of *territorium nullius*, maintains that barbarous and savage peoples, though backward in civilization, exercise rights of sovereignty which, if rudimentary, are nevertheless sufficient to render wrongful any occupation of their country. Salomon.  
§ 80.

Bonfilis and Jéze come to a conclusion in favour of the absolute right of the natives on the ground that a contrary theory would only sanction, under the pretext of civilization, the maxim 'might is right.' The uncompromising attitude adopted by the former of these two writers is well shown by the following quotation :

C'est à l'aide de conventions pacifiques que l'Europe doit chercher à pénétrer dans les régions habitées, non encore soumises à son influence.—C'est par voie de cession volontaire, consentie § 648.

par les chefs du pays, que la souveraineté peut être acquise par les États européens. Et cette cession volontaire n'est pas un déguisement de l'occupation ; car, il y a abandon de la souveraineté, rudimentaire parfois mais réelle cependant.

Despagnet.  
§ 396.

Despagnet also considers that the lack of civilization is not a cause of forfeiture of the rights of sovereignty. The propagation of civilization justifies only the establishment of pacific relations with barbarous countries. Territory governed by any sovereignty, however barbarous and rudimentary, should not be regarded as *territorium nullius* ; but if it is inhabited by people without appreciable political organization and not having even the conception of sovereignty, then it may be considered as open to occupation, although even in such a case any rights of property or prior possession should be respected.

L'Institut  
de Droit  
Inter-  
national.  
IX. Ann.  
247 sq.

The Institute of International Law at its session at Lausanne in 1888 adopted a declaration relative to the occupation of territories. The draft drawn up by the committee appointed to consider the question proposed to define *territorium nullius* as comprising 'any region not effectively under the sovereignty or protectorate of one of the States forming the community of international law, whether inhabited or not.' M. de Martitz, in submitting the draft, maintained that it was an exaggeration to speak of the sovereignty of savage or semi-barbarous peoples ; that history shows that International Law does not make the validity of an occupation depend upon a cession of the sovereignty ; that a treaty of cession can only be made by States recognizing International Law ; that although it cannot be said that backward peoples are outside the community of International Law they are not members of it ; and that International Law knows nothing of the 'rights of independent tribes.'

See also  
XIX.  
B.D.I.  
374.

X. Ann.  
173 sq.

This view, however, did not commend itself to the Institute. M. Engelhardt contended that there are some peoples who from certain points of view are savages, absolutely outside of the community of International Law, and yet it would be extravagant to consider their territory as *territorium nullius*. Even if a society has not an absolutely fixed territory, could one, he asked, justify in their case the right of force and spoliation ? The Institute refused to accept the definition proposed by the committee, nor would it adopt another proposal which limited *territorium nullius* to any region not effectively under the sovereignty of a State. In this connection the President defined a State as an organized political body as distinguished from a

## NATIVE SOVEREIGNTY RECOGNIZED IN PART 17

nomadic tribe ; with the appearance of organization, he considered, there can no longer be an occupation pure and simple but only a protectorate. In the end, the Institute declined to include any definition of *territorium nullius* in its declaration.

Looking back over all the opinions that we have noted of the publicists in Class (I), we see that, though they state their position in different ways, they do not differ materially among themselves. It appears that their opinions may be fairly said to amount to this : that wherever a country is inhabited by people who are connected by some political organization, however primitive and crude, such a country is not to be regarded as *territorium nullius* and open to acquisition by Occupation.

Summary  
of the  
opinions  
of the  
Publicists  
in  
Class (I).

### (II) Publicists who give a limited or conditional recognition to Sovereignty in Backward Peoples.

Among the writers who would only allow sovereign rights to backward peoples with limitations or under conditions, we will first refer to Vattel (Switzerland, 1758). He laid down that a nation might take possession of such lands as are uninhabited and ownerless, or are in excess of what would be required by a people leading a pastoral or roaming life if they cultivated the soil ; but the occupying State must be in need of more land. This doctrine is quoted with approval by Phillimore, writing nearly a century later ; and the same position is taken up by Eugène Ortolan.

Vattel.

I. §§ 81,  
207 & 200.  
II. § 87.  
Phillimore.  
§ CXXLII.  
§ 76.

G. F. De Martens (Professor at Göttingen and afterwards successively in the service of the Kings of Westphalia and Hanover), writing in 1789, while laying down that natural law does not authorize Christian people to take the districts already effectively occupied by savages against their will (' although in fact too many examples of such appropriation exist '), made an exception in the case of districts simply held by nomadic people.

G. F. De  
Martens.  
§§ 36 & 37.

Pinheiro-Ferreira (Portugal, 1889) and Bluntschli (Germany, 1868) took up positions which are very similar to one another, and which appear to amount to this : that the territory of backward peoples is open to occupation only so long as the natives do not resist the encroachments of the occupying State by force.

Pinheiro-  
Ferreira.  
On Vattel :  
Notes to I.  
§§ 203 & 209  
Bluntschli.  
§ 280.

None of these opinions appears to provide a satisfactory foundation for the formulation of a rule of International Law.

## (III) Publicists who deny Sovereignty to Backward Peoples.

The publicists in Class (III), namely, those who do not recognize the sovereignty of backward peoples as constituting a bar to the Occupation of their territories, belong principally to a comparatively recent period.

The general attitude adopted in England may be gathered from the following representative opinions :

**Westlake.**  
*Int. Law, I.*  
*Ch. V.*  
*Collected*  
*Papers,*  
*Ch. IX.*  
23 *R.D.I.* 243.

Westlake's view was that the only territorial titles recognized by International Law are those which are held by States that are so far organized that they can protect the white settler in the pursuits of the civilized life to which he has been accustomed, and administer justice in the questions arising out of them ; or, at least, States that can do these things in conjunction with consuls accredited to them.

**Hall.**  
*II. II.*  
*(p. 125).*  
*Foreign*  
*Powers, etc.*  
§§101 & 95  
*(note).*

Hall regards all territory that is 'unappropriated by a civilised or semi-civilised state' as open to Occupation. In another place, however, he allows that native chiefs possess rights of sovereignty which they can cede by treaty.

**Oppenheim.**  
§ 221.

Oppenheim also considers that Occupation is applicable to land inhabited by natives under a tribal organization whose community is not to be considered as a State ; but that the territory of any State, even though such State is entirely outside the Family of Nations, is not a possible object of Occupation and can only be acquired through Cession or Subjugation.

**Lawrence.**  
§ 74.

Lawrence extends the class of *territorium nullius* to include all territory not in the possession of States who are members of the Family of Nations and subjects of International Law. The attainment by the original inhabitants of some slight degree of civilization and political coherence is not, he considers, sufficient, from the point of view of International Law, to bar the acquisition of their territory by Occupancy.

**Dudley Field.**  
§§ 35, 78 & 79.

In the United States, Dudley Field (1876) also lays down that territory occupied by a savage nation can be acquired by Occupation. But he does not consider that any parts of Europe, Asia or America are open to acquisition in this way. And he even goes so far as to say that, when an uncivilized community has an established government, 'that government is to be respected by civilized governments so far at least, as that in the first instance intercourse with its people is to be sought through such government, and redress for injuries from any of them is to be demanded of it.'

The Portuguese jurist and statesman, Martens-Ferrão, who in this connection is quoted with approval by Westlake, would allow no legal effect to 'cessions made by native chiefs, half or wholly savage, to the chance comer who gives them the most,' on the ground that such chiefs do not 'possess any constituted sovereignty, that being a political right derived from civilisation.'

Martens-Ferrão.  
Westlake,  
I. vi.  
23 E.D.J. 248.

Heimbürger (Germany) takes up the same position, but he has difficulty in endeavouring to explain away the fact that European Powers do in practice conclude treaties with native chiefs for the cession of sovereignty, which those Powers do, he admits, regard as binding. He contends, however, that such a treaty merely expresses the willingness of the chief to subject himself and the people under his power to the sovereignty of the European State, and not to resist the occupation. The acquisition is really made by way of Occupation and not by Cession, although it is a special kind of Occupation coming into operation upon a treaty basis—'einer auf vertragsmässiger Grundlage sich vollziehenden besondern Art der Okkupation.'

Heimbürger.  
pp. 112 & 113.

Now to say that a country is open to Occupation when it is not under the sovereignty of a State, or is occupied by a savage nation, does not carry us far unless we are agreed upon a definition of the term 'State,' or know the characteristics that are to distinguish savage from civilized peoples. No race is without organization of some kind, and if, with Salmond, we regard as a State every society which performs the functions of war and the administration of justice, many peoples usually regarded as savage would form a State. It is clear, however, that the writers who take as the criterion the existence of a State would not allow this wide meaning to the word.

Criticism  
of the  
opinions  
of the  
Publicists  
in Class (III).

What is  
a State?  
Ratzel:  
*Hist. of  
Mankind*, I  
§ 13.  
Salmond:  
*Jurispru-  
dence*, § 36.

Even when the rule is put in terms of the States which are members of the Family of Nations or form the community of International Law, it is still not precise. The community within which International Law operates is not one with definite limits. Some States may be within it for some purposes but not for others, and the difficulty remains to determine which of them is within it for this particular purpose. And lack of precision here occurs at a point where conciseness is particularly desirable. For most of the land inhabited by the more primitive peoples has already been absorbed by advanced States; and if those States are to extend their borders still further it must, in the main, be over more highly developed territory.

States  
which are  
not full  
members  
of the  
Inter-  
national  
Family.  
See Pitt  
Cobbett,  
I. 48.

## Summary of Publicists' Opinions.

Comparing these three schools of thought, we see that, extending over some three and a half centuries, there had been a persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belonged to no one. But that, and especially in comparatively modern times, a different doctrine has been contended for and has numbered among its exponents some well-known authorities; a doctrine which denies that International Law recognizes any rights in primitive peoples to the territory they inhabit, and, in its most advanced form, demands that such peoples shall have progressed so far in civilization as to have become recognized as members of the Family of Nations before they can be allowed such rights.

Lands inhabited by any Political Society are not  
'Unoccupied.'

What are  
uncivilized  
races?  
Sir John  
Macdonell  
in the  
*Journal of  
the Socy. of  
Comparative  
Legislation*,  
XII. 230.  
Ratzel;  
*Hist. of  
Mankind*,  
I. §13.  
See also  
*Ann. L. of  
the Inst. de  
Droit Int.*,  
178.

Now the progress of ethnography has shown that the distinction between civilized and uncivilized is not one that can be drawn with accuracy in practice. The proper distinction is not between civilization and no civilization, but between one kind of civilization and another, or one stage of development and another. Many of the so-called 'savage' races—or, as Ratzel calls them, 'natural' races—possess organized institutions of government, and it cannot be truly said that the territory inhabited by such races is not under any sovereignty. Such sovereignty as is exercised there may be of a crude and rudimentary kind, but, so long as there is some kind of authoritative control of a political nature which has not been assumed for some merely temporary purpose, such as a war, so long as the people are under some permanent form of government, the territory should not, it would seem, be said to be unoccupied.

Even some of the authors who deny rights of sovereignty to backward races allow them rights of property which they can transfer so as to give a title which, as Westlake puts it, 'may be of legal validity even under the white government to be ultimately established.' Property and its transfer are matters which, Westlake considers, the natives can understand, 'but certainly not the complicated arrangements of a modern State.'

But sovereignty does not necessarily involve 'the complicated arrangements of a modern State,' and there would seem to be no sufficient reason for saying that backward peoples have not as good an understanding of the powers which in practice constitute the simpler form of sovereignty which they exercise, or to which they submit, as they have of the rights of property recognized amongst them. It is not necessary to the possession of powers which are in fact sovereign powers that the nature of sovereignty as a political conception should be understood; and it is difficult to see why, if the natives are to be regarded as capable of possessing and transferring property, they should not also be considered competent to hold and transfer the sovereignty which they actually exercise.

General considerations thus go to support the views of the writers whom we have grouped in Class I. The contention that, notwithstanding these considerations, International Law has no place for rules dealing with the rights of peoples who are not members of its community, will be dealt with in Chapter V after we have considered what light the actual practice of States throws upon the question.

### *What is a Political Society?*

In practice it will in general be possible to say in a given case whether or no there is a political society to be dealt with; and in cases of doubt a government or its agent will act on the facts as they present themselves, trusting to prescription to perfect a title, which perhaps in strictness should have been based upon a cession, when no such cession has been obtained. For the sake of theoretical completeness, however, it is desirable to examine the matter rather more closely.

*Ses p. 41  
below.*

Austin's well-known test for the political character of a society is that 'the bulk of its members must be in a habit of obedience to a certain and common superior.' But although compliance with such a condition by a numerous society would be sufficient, it does not appear to be necessary in every case. Sovereignty may reside in the community as a whole, and not necessarily in some superior individuals or body of individuals, and for the present purpose it is sufficient to inquire whether a given society does in fact discharge functions which are of a political nature, no matter whether it is or is not so constituted as to be under the rule of a definite superior.

*Lect. VI.  
(224).*

*Ses  
Holland:  
Juris-  
prudences,  
Ch. IV.*

*Ses  
Salmond,  
§ 36.*

Now the most distinctive function of a political society is to affect the members of the community as such in such a way as to

make their general conduct conform to certain standards in their mutual relationships. Usually it effects this end by visiting lapses from the standards with punishment, and this point has been seized upon by Austin and his school and made the essential feature of a political society. But so long as the standards are habitually conformed to, the reason for conformity would appear to be of secondary importance. If, for example, the members of a community do indeed so conform, merely by force of custom or from fear of supernatural consequences, the society should nevertheless be regarded as a political one.

See Maine :  
*Early Hist.  
of Institutions*,  
Lect. XIII.

But is the production of a uniformity of general conduct among members of the community as such the only essential function that a political society need perform? Or must one go farther and say that the society must also be united for the purpose of resisting external aggression? It is submitted that the latter function is not an essential one.

Suppose, for instance, that an island was inhabited by a community which had never been threatened from outside, and therefore had never combined for common defence. It would not be reasonable to say that such a community could not be a political one, whatever might be its internal organization. A political society must, it is true, possess some degree of permanence; but so long as it does in fact persist, it would seem to be immaterial whether its persistence is due to its ability to defend itself, or to any other cause, such as the respect of its neighbours for existing conditions.

Lect. VI.  
(p. 231).

But no society can be said to be political unless its numbers are, to use Austin's word, 'considerable'; that is to say, unless it is composed of a number of families.

If, then, a numerous society is permanently united by the habitual conformity of the bulk of its members to recognized standards in their relations *inter se*; if laws 'set or imposed by the general opinion of the community' are habitually observed or their breach punished, even though no one person, or no determinate body of persons short of the whole community, is charged with their enforcement, such a society should, it would seem, be regarded as a political one.

See Austin,  
Lect VI.  
(p. 232).

#### *Occupied Territory further defined.*

Returning to our description of occupied territory, we may thus say that, in order that an area shall not be *territorium nullius*, it would appear, from general considerations, to be

necessary and sufficient that it be inhabited by a political society, that is, by a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards.

It would follow that if a tract of country were inhabited only by isolated individuals who were not united for political action, so that there was no sovereignty in exercise there, such a tract would be *territorium nullius*.

Land inhabited by isolated individuals may be *territorium nullius*.  
II. § 97.

Vattel, it is true, did not hold this opinion, for he says that when several independent families are settled in a country without forming a political society, so that they possess the free domain but without sovereignty, nobody can seize the empire of that country, since that would be to reduce those families into subjection against their will. He is, apparently, referring only to the case in which the families in question are properly cultivating the soil; but even in such a case it would appear that the only rights possessed by them are rights of property, and that, as regards the sovereignty, the country would be *territorium nullius*.

## CHAPTER IV.

### INHABITED LANDS: STATE PRACTICE.

In the preceding Chapter we came to the conclusion that general considerations support the opinions of those writers and jurists who hold that, in order that a tract of inhabited country may be open to acquisition by Occupation, it must be one the dwellers in which are not united permanently for political action. We will now turn to the facts of history and endeavour to ascertain to what extent that view is in harmony with the principles that have been observed by States in actual practice.

#### *Fifteenth, Sixteenth and Seventeenth Centuries :*

##### *Non-Christian Lands*

The principle that lands inhabited by infidels were open to acquisition by Christians, a principle which, as we have seen, was for a long time held by jurists and theologians, was acted upon by the European Powers in extending their dominion over the lands that were discovered in the fifteenth and sixteenth centuries.

Bull of  
Nicolas V.

See  
Ch. XVII.  
below.  
Schmauss,  
I. 114.

Nys :  
*Les origines*  
*etc.*, 370.

Bull of  
Alexander  
VI.

Hazard, 2  
Commis-  
sions to  
Naviga-  
tors.

This principle shows itself in the papal bulls. Thus in 1452, Nicolas V. accorded to Alphonse of Portugal the right to attack, subjugate and reduce into perpetual servitude the Saracens, pagans and other enemies of Christ : and the well-known Bull *Inter Caetera* of Alexander VI., granting to Ferdinand and Isabella the exclusive right of acquiring dominion in the New World, is limited to lands which were not actually possessed by any Christian King or Prince before 1493, and it requires Ferdinand and Isabella to lead the inhabitants to the Christian faith.

The earlier royal commissions to navigators and explorers show that the principle was accepted and acted upon by the European nations, as the following examples will illustrate.

The letters patent granted by Henry VII. in 1495 to John Cabot and his three sons authorized them to seek out, discover and find any islands, countries, regions or provinces of any heathens and infidels in any part of the world which previously had been unknown to Christians, and to subdue, occupy, and possess them, getting unto the King the rule, title and jurisdiction thereof.

Henry VII.  
to the  
Cabots.

Ib. 9.

The letters patent of François I. of France to de Roberval (1540) were granted in respect of 'Canada et Ochelagua, et autres circonjacens, mesmes en tous pays transmarins (et maritimes), inhabitez ou non, possédez et donnez par aucuns princes chrestiens.'

François I.  
to de  
Roberval.  
Gourd, I.  
208.

Queen Elizabeth's charter to Sir Humphrey Gilbert (1578) authorized him 'to discover, finde, search out, and view such remote, heathen and barbarous lands, countries and territories, not actually possessed of any Christian prince, or people'; and a similar charter was afterwards granted to Sir Walter Raleigh.

Elizabeth  
to Sir  
Humphrey  
Gilbert and  
Sir Walter  
Raleigh.  
Hazard,  
24 & 33.

The same principle emerges from the charters granted to the early Companies that were formed to found settlements and carry on trade in the New World.

Charters to  
Coloniza-  
tion Com-  
panies.

By the first charter of Virginia (1606), James I. empowered the grantees to found a plantation and colony on the mainland of America along the sea-coasts, and in the islands within a hundred miles of the coast, between 34° and 45° north latitude, 'either appertaining unto us, or which are not now actually possessed by any Christian Prince or people': and the charter of New England (1620), which granted all the territory between 40° and 48° north latitude 'throughout the Maine Land from Sea to Sea,' stated 'that there is noe other the Subjects of any Christian King or State, by any Authority from their Sovereignes, Lords, or Princes, actually in possession of any of the said Lands,' and expressed reverent thanks to God's Divine Majesty 'for his gracious favour in laying open and revealing the same unto us, before any other Christian Prince or State.'

Charters of  
Virginia  
and New  
England.  
Ib. 50.

Ib. 103.

The French grants of 1685 and 1642 to the Compagnie des Isles de l'Amérique gave them the islands in the West Indies between 10° and 30° north latitude, 'qui ne sont occupées par aucuns princes chrétiens.'

Compagnie  
des Isles  
de  
l'Amérique  
Petit, I.  
5 & 10.

The Hudson's Bay Company was granted by Charles II. in 1670 all the lands and territories around Hudson's Bay, 'which are not now actually possessed by any of our Subjects, or by the subjects of any Christian prince or state.'

Hudson's  
Bay  
Company.  
Bryce, G.,  
Ch. II.

Lands not  
occupied by  
Europeans.

Later on the distinction was drawn between lands already occupied by Europeans and lands not so occupied, although in effect this was the same as the earlier distinction between Christian and non-Christian lands.

Twiss:  
Oregon 71.

Thus, in 1776, the British Admiralty ordered Captain James Cook to explore the coast of North-west America, to avoid all interference with the establishments of European Powers, to take possession, in the name of his Sovereign, of any countries which he might discover to be uninhabited, and, if there should be inhabitants in any parts not yet discovered by other European Powers, to take possession of them with the consent of the natives. And a few years later, in a controversy with Spain with reference to the seizure of English trading ships on the coast of North-west America, Great Britain contended that she had a right to the possession of such establishments as English subjects should form 'with the consent of the natives of the country, not previously occupied by any of the European nations.'

ib. 108.

*Non-Christian Lands were to be acquired by Conquest  
or Cession.*

But although the Europeans Powers assumed, as between themselves, that they could acquire any lands not in the possession of Christians, it does not follow, and was not the case, that those lands were considered to be vacant and open to acquisition by Occupation.

Prosscott;  
Mexico,  
III. Ch. VII.

Papal  
grants gave  
rights to  
conquer  
non-  
Christian  
lands.

Schmause, I.  
114.

Hazard, 3.

Discovery  
gave rights  
to acquire  
by Con-  
quest or  
Cession.

Worcester  
v. State of  
Georgia,  
6 Peters at  
543 sq.

The rights which the Popes purported to bestow were rights to conquer the territories named in the grant. The grant of Nicholas V. to the King of Portugal in 1452 was to invade, conquer, storm, attack and subjugate (invadendi, conquirendi, expugnandi, debellandi, & subjugandi) the Saracens, pagans, and other enemies of Christ, and reduce them to perpetual servitude. And the Bull *Inter Caetera* of Alexander VI. also assumes that Ferdinand and Isabella intend to subdue (subjicere) the lands and islands and their inhabitants and dwellers.

Again, the rule that discovery gave rights to the discoverer's State in respect of the land discovered was adopted to regulate the competition between the European Powers themselves, and it had no bearing upon the relations between those Powers and the natives. What the discoverer's State gained was the right, as against other European Powers, to take the steps which were appropriate to the acquisition of the territory in question. What those steps were would depend upon whether there was

already a native population in possession of the territory ; and if it became necessary for a State that had acquired rights by discovery to fight with the natives in order to turn those rights of acquisition into rights of possession, its new territory would be an acquisition by Conquest, none the less because no other European Power had the right to make the Conquest.

Story :  
*Commentaries*, § 2.  
And see  
Ch. XVIII.  
below.

### The Powers in America.

Here again, we may refer to the earlier commissions granted by the European Sovereigns to navigators and discoverers, as these afford good evidence of the fact that Conquest or Cession was regarded as the normal method of acquiring territory already in the possession of native tribes.

Commissions to Navigators.

The first commission of Ferdinand and Isabella to Columbus, dated the 30th April, 1492, referred to lands to be discovered and conquered :

Ferdinand and Isabella to Columbus.  
Hazard, I.

For as much as you, Christopher Columbus, are going by our command, with some of our vessels and men, to discover and subdue some Islands and Continent in the ocean, and it is hoped that by God's assistance, some of the said Islands and Continent in the ocean will be discovered and conquered by your means and conduct, therefore it is but just and reasonable, that since you expose yourself to such danger to serve us, you should be rewarded for it. And we being willing to honour and favour you for the reasons aforesaid ; Our will is, That you, Christopher Columbus, after discovering and conquering the said Islands and Continent in the said ocean, or any of them, shall be our Admiral of the said Islands and Continent you shall so discover and conquer.

The Cabots were to subdue, occupy and possess (subjugare, occupare, possidere) on behalf of Henry VII. such lands as they might discover.

Henry VII. to the Cabots.  
Ib. 9.

The alternatives present to François I. were clearly cession from or conquest of the natives of Canada when he authorized de Roberval in 1540 to 'descendre et entrer en iceulx, et les mettre en notre main, tant par voye damittié ou amyables compositions, si faire se peulx, que par force darmes, main forte et toutes autres voyes d'hostilité,' and to constitute officers 'pour l'ontretenement, conqueste et tuition desdits pays.'

François I. to de Roberval.  
Gourd, I. 211.

The same appears from the charter of Acadie granted by Henri IV. of France in 1603, by which de Monts was empowered as follows :

Henri IV. of France to de Monts.

assujettir, submettre et faire obéir tous les peuples de la dite terre . . . traiter et contracter, à même effet, paix, alliance, et confédéra-

Ib. 230.

tion, bonne amitié, correspondance et communication avec lesdits peuples et leurs Princes, ou autres ayans pouvoir et commandement sur eux—entretenir, garder et soigneusement observer les Traités et Alliances dont vous conviendrez avec eux, pourvû qu'ils y satisfassent de leur part, et, à ce défaut, leur faire guerre ouverte, pour les contraindre et amener à telle raison que vous jugerez nécessaire, pour l'honneur, obéissance et service de Dieu, et l'établissement, manutention et conservation de notre dite autorité parmi eux.

Later on, the charter mentions definitely 'la conquête, peuplement, habitation et conservation de ladite terre de la Cadie.'

The  
Spanish  
Conquests  
of  
Mexico  
and Peru.

Procourt;  
Peru, III.  
Ch. I.

Markham:  
Chs. XII.  
XIV, XVI.  
& XVIII.  
Ib. XI. &  
XVIII.  
But see  
Payson, I.  
180.

Position of  
the natives  
recognized.

The claims of Spain to the New World were based, as against other European Powers, upon discovery and papal grant, but the acquisition on behalf of the Spanish Crown of Mexico by Hernando Cortes in 1518-21, and of Peru by Francisco Pizarro in 1538, are always regarded as conquests. In the capitulation granted by the Spanish Crown to Pizarro before he set out on his bold undertaking, he is given 'the right of discovery and conquest in the province of Peru'; and, even after making allowance for exaggeration in the Spanish accounts, no other name than conquest is appropriate to the method by which European weapons, aided by the brilliant generalship of Cortes and the cunning of Pizarro, enabled the Europeans, with the aid of their native allies, to overthrow the well-organized and, except as against European arms, powerful empires of the Aztecs and the Incas. In these cases, it is true that the Spaniards were dealing with peoples in a comparatively advanced stage of civilization, but the mode of acquisition was not different in kind from that by which the greater part of the rest of the continent was secured.

From these examples it is clear that the European Powers did not consider that the parts of the American continent which belonged to none of them were necessarily without an owner, and that they recognized that the fact that native tribes were in possession of, and prepared to fight for, their territories, made Conquest the only possible method of acquisition.

*American Jurists on Discovery, Conquest and Cession  
in North America.*

Story.

Failure to recognize that the extension of British dominion in America presents different aspects according as it is viewed as a question between Great Britain and the other European Powers, or between Great Britain and the natives, led Justice Story to find fault with Sir William Blackstone for saying that

the American plantations had been obtained by right of conquest or by treaties. 'The European nations,' says the distinguished American jurist, *Commentaries*, §182.

claimed an absolute dominion over the whole territories afterwards occupied by them, not in virtue of any conquest of, or cession by, the Indian natives, but as a right acquired by discovery. Some of them, indeed, obtained a sort of confirmatory grant from the papal authority. But as between themselves they treated the dominion and title of territory as resulting from priority of discovery. . . . The title of the Indians was not treated as a right of propriety and dominion, but as a mere right of occupanoy. As infidels, heathen, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations. The territory over which they wandered, and which they used for their temporary and fugitive purposes, was, in respect to Christians, deemed as if it were inhabited only by brute animals. There is not a single grant from the British crown, from the earliest of Elizabeth down to the latest of George the Second, that affects to look to any title except that founded on discovery. Conquest or cession is not once alluded to.

Now this, speaking broadly, is not an inaccurate description of the way in which the European Powers looked at the matter in their dealings with one another. But, as we have already noted, what the discoverer's State obtained, as against other European Powers, was the right to *acquire* the lands discovered—what in later times might have been called a 'sphere of influence'—and questions dealing with the *mode* of acquisition had no place in a statement of the grounds upon which one European Power based its claims as against the others. As the Supreme Court of the United States said in the case of *Worcester v. The State of Georgia* in 1832, the royal grants and charters 'asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned.' The omission from the British grants of any reference to Conquest or Cession is, therefore, not surprising, and it is not possible to infer therefrom what the actual mode of acquisition was or was not.

This in fact follows from what Story himself says in the remainder of the passage quoted above, for he states that it is impossible that Conquest or Cession should have been alluded to in the British grants, 'for at the time when all the leading grants were respectively made, there had not been any conquest or cession from the natives of the territory comprehended in

6 Peters at 546.

Kent: *Commentaries*, III. 384.

those grants', and he goes on to say that, even in respect to the territory of New York and New Jersey, which he admits were conquered—from the Dutch—England claimed this very territory, not by right of this conquest, but by the prior right of discovery.

‡3.

In another place Story takes up a position which it is difficult to distinguish from that of Blackstone, when he says :

There is no doubt that the Indian tribes, inhabiting this continent at the time of its discovery, maintained a claim to the exclusive possession and occupancy of the territory within their respective limits, as sovereigns and absolute proprietors of the soil. They acknowledged no obedience or allegiance or subordination to any foreign sovereign whatsoever, and as far as they have possessed the means, they have ever since asserted this plenary right of dominion, and yielded it up only when lost by the superior force of conquest, or transferred by a voluntary cession.

Marshall.

The principle that discovery merely gave a right to acquire by Conquest or Cession is also well brought out in the celebrated judgment of Chief Justice Marshall in the case of *Johnson v. M'Intosh* (1823) :

8Wheaton's  
Reps. at  
587 & 8.

They (the United States) maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest ; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise. . . . We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny.

Kent.  
Commentaries,  
I. 268.  
Also III.  
380-4.

Chancellor Kent puts the matter in much the same way : 'The Indians,' he says, 'have only a right of occupancy, and the United States possess the legal title, subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title of occupancy, either by conquest or purchase. The title of the European nations, and which passed to the United States, to this immense territorial empire, was founded on discovery and conquest.'

No doubt the right of occupancy which was allowed to the Indians after the sovereignty over their territory had been acquired was considered in the main to be in the nature of a property right, and as such it will be considered in Chap. XXXVII. of this work. The point which it is desired to bring out here is

that, along with or merged with rights which in a more settled community took on the nature of rights of property, the aboriginal inhabitants of the American continent at the time of its colonization were in fact exercising rights which American jurists recognized to be extinguishable only by Conquest or Cession, and which can only be regarded as in the nature of rights of sovereignty.

*European action in America summarized.*

Summing up the attitude of the European Powers towards the American continent, we may say that while, as between themselves, they regarded as appropriable any land not occupied by Christians, and while they considered that the right to appropriate such lands was in the discoverer, they recognized that lands in the possession of the natives were not vacant, and that, as between the natives and the European Power, they were to be acquired by Conquest or Cession.

Wheaton,  
p. 280.

**The Powers in Asia.**

In Asia, where European dominion has been extended over vast territories, occupied by peoples who, though in a more advanced stage of civilization than the native races of America or Africa, would not as a rule be considered to be members of the Family of Nations, the mode of extension has also been Conquest or Cession.

The charter of Charles II. of 1661 empowered the East India Company to give their commanders authority to continue or make peace or war with any people that were not Christians in any places of their trade ; and the history of the spread of the British power in India is a history of wars, treaties of alliance, treaties of peace, and treaties of protection between the British and the native States ; of the 'gradual incorporation under one dominion of States that have submitted and States that have been forcibly subdued.'

Great  
Britain in  
India.  
Libert,  
Ch. I.

Lyall, 244.

Treaties made with the native rulers and conquests have also been the methods by which Dutch sovereignty has been established in the East.

Holland in  
the East  
Indies.  
F.O. Hand-  
books Nos.  
82-7.  
Russia in  
Northern  
and Central  
Asia.

In the main, the Russian Empire in Asia has been extended by Conquest. Siberia and the Steppe were conquered by the Cossacks in the sixteenth and seventeenth centuries, and, in the latter half of the nineteenth century, the Khanates of Bokhara, Khiva, and Kokund and the Turkoman tribes

Mackenzie  
Wallace,  
Ch. 40.  
Geoffrey  
Drage, 392.  
F.O. Hand-  
book No.  
56.  
Skirne,  
Ch. VI.  
58 S.P. 835.

succumbed to the Russian campaigns. That Russia regarded her advance in Central Asia as a matter of Conquest appears from the circular sent by Prince Gortchakoff to the diplomatic agents of Russia in November 1864. After stating that, in Central Asia, Russia was in contact with semi-savage peoples whose incursions and aggressions made it necessary for her to extend her borders time after time in order to ensure the security of her frontiers, the circular continued :

Le Gouvernement Impérial s'est donc vu placé, malgré lui, dans l'alternative que nous avons indiquée, c'est-à-dire, ou de laisser se perpétuer un état de désordre permanent qui paralyse toute sécurité et tout progrès, ou de se condamner à des expéditions coûteuses et lointaines sans aucun résultat pratique et qu'il faut toujours recommencer, ou enfin d'entrer dans la voie indéfinie de conquêtes et d'annexions qui a conduit l'Angleterre à l'Empire des Indes, en cherchant à soumettre l'un après l'autre, par la force des armes, les petits Etats indépendants dont les mœurs pillardes et turbulentes et les perpétuelles révoltes ne laissent à leurs voisins, ni trêve ni repos.

France in  
Indo-  
China,  
*Camb. Mod.  
Hist.* XII.  
523 *sq.*  
Martens,  
2nd Series,  
XII. pp.  
627, 634,  
& 637.  
*See also*  
Ch. XXIII.  
*below.*

France, too, in Indo-China, has established her position—in territories over which China claimed suzerain rights—by treaties obtained with the local Powers through successful wars. The protectorate over Cambodia in 1863 and the cession of provinces in Lower Cochin China followed the French expedition and the capture of Saigon, and the protectorate over Annam and Tonking was the result of the wars of 1873 and 1883.

### The African Conference of Berlin.

When we turn to the proceedings and General Act of the Conference of Berlin of 1884-85 in order to ascertain the opinions of the Western Powers regarding the method by which territory in Africa was open to acquisition by them, it might appear at first sight that they considered that method to be Occupation, and it might seem that, in the discussions of the Conference and Commissions, it was generally assumed that the natives possessed no rights of sovereignty. Thus, rules were agreed to relating to the freedom of trade, neutrality, navigation, etc., over a vast area, 'the Conventional Basin of the Congo,' which was occupied by native races and the greater part of which was not at that time in the possession of any of the Powers represented at the Conference.

But when we look more closely at the proceedings of the

Conference, we find that this is not the view by which they can be best explained. Article I. of the General Act, which defines the boundaries of the Conventional Basin of the Congo, provides that, 'in the territories belonging to an independent Sovereign State this principle shall only be applicable in so far as it is approved by such State.' This proviso was inserted particularly in view of the claims of the Sultan of Zanzibar. When it was under discussion, it was recognized that there were other 'African Sovereigns' on the East Coast, and it was asked 'what must be concluded in case other sovereignties should be found established in the geographical basin of the Congo.'

C.-4301  
(1885) 300.  
C.-4739  
(1886) 13.

C.-4361  
(1885) 182.

The representative of France, however, expressed the opinion 'that the High Assembly need not occupy itself with other sovereignties, on the subject of which it possesses no precise notions,' although the acquired rights and legitimate interests of the native Chiefs should be considered as far as possible.

That those rights included rights of sovereignty was recognized by the Commission that considered this matter. 'With regard to the native Princes,' runs its report, 'the majority have already alienated their rights of sovereignty, and with the others it will be right and possible to arrive at equitable arrangements.'

C.-4301  
(1885) 78.

The plenipotentiary of the United States (Mr. Kasson) inquired, 'if it would not be suitable to lay down explicitly the intentions of the Conference to respect, in a general way, the rights of the native chiefs in the region traced by the Acts.' But it was considered that 'the protocol would prove the sentiment of the high assembly regarding the caution to be observed when dealing with the native chiefs whose position interests Mr. Kasson.'

At a later sitting, in which the Conference had under discussion the essential conditions to be fulfilled in making new occupations on the coasts of the continent generally, Mr. Kasson, while approving the declaration as a first step, desired to add to the protocol that :

Modern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary territory. In conformity with this principle, my Government would gladly adhere to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression.

15. 200.

The President, however, remarked that this declaration 'touched on delicate questions, upon which the Conference hesitated to express an opinion.'

Upon the whole, it appears legitimate to say that, although at the Conference the method of acquiring territory in Africa was referred to generally as 'Occupation,' the term was used with a broad meaning equivalent to 'Acquisition' or 'Appropriation,' and was not confined to Occupation in the strict sense which applies only to *territorium nullius*. This view is supported by the fact that the assumption of protectorates was dealt with in the General Act under the heading of 'New Occupations,' since at that time a protectorate generally implied a State or Government to be protected.

See  
Westlake,  
I. IV.

#### The Powers in Africa.

That the lands of native tribes were not looked upon as *territorium nullius* also emerges very clearly when we consider the actual procedure by which the various Powers extended their sovereignty over Africa. From such an investigation it appears that the territorial rights of the European Powers in Africa were in general those which they had obtained by Cession from the native chiefs. In fact, the way in which a Power set about the appropriation of a tract of country was generally by making treaties with the chiefs of all the native tribes included within it.

#### *Great Britain and Germany in the Cameroons.*

76 S.P. 755 sq.

Scott  
Keltie,  
Ch. XIII.

This is shown very clearly, for instance, in the case of the Cameroons. There the chiefs had frequently asked to be taken under British dominion, and this request was strongly supported by the British Consul and British residents in the Cameroons. At the end of 1888, the British Government decided to place the region under British protection. But before the decision could be put into force, the British Foreign Minister was officially informed that Dr. Nachtigal had been commissioned by the German Government to visit the West Coast in order to obtain certain information regarding German commerce, and conduct negotiations on certain questions, and the British Minister instructed the colonial authorities to render the German Consul-General all possible assistance. When he reached the Cameroons, Dr. Nachtigal and the German traders endeavoured to persuade the chiefs to place themselves under

German dominion. An English officer urged the chiefs to conclude no treaty until the arrival of the British Consul; but when that officer reached the Cameroons to declare the British protectorate, he found that treaties had been completed with the local chiefs by the German Consul-General whereby the country had been placed under the protection of Germany, and he hurried off to make treaties on behalf of Great Britain with the chiefs on other parts of the coast. There was thus, as the German Ambassador subsequently remarked, 'something like a race' between the representatives of the two countries. The British Foreign Minister complained of the way in which he had been misled by the German authorities in regard to the mission of Dr. Nachtigal, but the German title under the treaties so secured was not disputed. 76 S.P. 770.

*Great Britain, Germany and France on the Niger.*

Similar 'races' occurred in the Niger region; at one time between representatives of Great Britain and Germany, and, later on, between those of Great Britain and France; and the history of the way in which British sovereignty was extended in that part of Africa also shows how great was the importance attached in Europe to treaties with the natives.

When German aspirations to territory on the Niger became known to the British National African Company in 1885, they hastened to make their position secure by concluding treaties with the chiefs along its banks. So effectively was this done that, when the German representative arrived, he found that he had been completely forestalled, and the British Company was left in undisputed possession of the territory.

Scott  
Keltie,  
Ch. XVI.

In 1886, the Company was granted a charter by the British Government in which its territorial rights were based upon thirty-seven treaties that it had made with the natives. Referring to these treaties the charter recited that, 'the Kings, Chiefs, and peoples of various territories in the basin of the River Niger . . . have ceded the whole of their respective territories to the Company by various Acts of Cession.' These treaties had all been made during 1884.

17 Hordalet, 116  
C.-8372  
(1899).

Earlier in 1884, a British Consul had concluded treaties with the same Chiefs. By these treaties British protection was extended 'to the territory under their authority and jurisdiction,' and the Chiefs promised to have no dealings with foreign Powers without the sanction of Great Britain, and ceded

*Foreign  
Powers, etc.  
§ 95 (note).*

jurisdiction over British subjects and property. Hall points out that the cessions to the Company were wide enough to cover the powers already granted to the British Crown, and that the two sets of treaties would have been, to a great extent, inconsistent with one another but for the fact that territorial powers acquired by a British subject accrue to the Crown. Under the circumstances, he considers that the charter must be regarded 'as recognizing the full property and sovereignty' obtained by the cessions to the Company.

*Shaw, F. L.  
(Lady  
Lugard):  
A Tropical  
Dependency.  
256 sy.*

After the Company had received its charter, it continued to extend its rule and the sovereignty of Great Britain into the interior of the continent by making treaties with the tribes farther inland. In so doing it came into sharp competition with the French. Territories that had been ceded to the British were sometimes claimed by the French upon the ground that they had obtained a cession of them from a paramount Chief. In the case of certain territories on the West of the river, the British treaty had been made with a Chief whose headquarters were at Boussa. The French alleged that this Chief was merely the vassal of a more powerful Chief at Nikka, and a 'race' for that town ensued in 1894. Captain (now the Right Hon. Sir Frederick) Lugard and his escort arrived five days before the French mission, and obtained the coveted treaty by which the territories were confirmed to Great Britain.

#### *Great Britain in Bechuanaland.*

*17 Hertzel,  
21 & 22.*

South Africa, too, furnishes a striking example of the recognition, by Great Britain, of full rights of sovereignty in native chiefs. In May 1884 identical treaties were concluded by Great Britain with Mankoroane, Chief of the Batlapings, and Montsioa, Chief of the Barolongs, by which these Chiefs agreed as follows :

I give the Queen to rule my country over white men and black men ; I give her to publish laws and to change them when necessary, and to make known the modes of procedure of the courts, and to appoint judges and magistrates and police or other officers of Government as may be necessary, and to regulate their duties and authority : To arrest criminals, to release them on bail, or to hold them as prisoners, and to convey them as such from one place to another in this country, or to convey them as prisoners out of this country, according to the laws of the Queen : To collect money (taxes) among the inhabitants of the country . . . which will go to defray the expense of the work done in this country by the Queen,

to levy court fees, to impose fines, and to employ the money thus obtained according to the laws of the Queen. Further, I give to the Queen, whom I have called, to originate and carry forward all works necessary to establish the courts and the laws, and effectually to confirm the government and authority which I give to the Queen by this agreement.

By Order in Council of the 27th January, 1885, provision was made for the exercise of British jurisdiction over Bechuanaland and the Kalahari, the countries of the Batlapings and the Barolongs being included within the limits of the Order. The Order recited the treaties referred to above and their provisions. The jurisdiction conferred by it was to extend to the following classes of persons :

(1) All persons within the limits of this Order who are British subjects by birth or naturalization, or are otherwise for the time being subject to British law. (2) All persons properly enjoying Her Majesty's protection within the said limits. (3) All persons within the limits to which the aforesaid Treaties with Mankoroane and Montsioa respectively extend, whether such persons are natives of Africa or not, and whether subjects of any African or non-African Power or not.

A marked distinction was thus made in the Order between the territories covered by the treaties and the other territories dealt with. Outside the countries of the Batlapings and the Barolongs, jurisdiction was conferred only over persons subject to British law and persons enjoying British protection ; within those countries it was extended over the natives and the subjects of non-African Powers, the right so to extend it being based upon the treaties. By accepting the cession of so complete a jurisdiction from the chiefs, and grounding her right to exercise it upon that cession, Great Britain must be taken to have recognized that the chiefs possessed in full measure the sovereignty over their respective countries.

*Great Britain in Matabeleland and Mashonaland.*

The same principles emerge from the Report which the Judicial Committee of the Privy Council made in 1919 in the matter of the Southern Rhodesian land claims. 1919 A. C. 211.

The Judicial Committee found that the community over which Lobengula ruled was tribally organized, and that, although 'it had passed beyond the purely nomad stage,' it remained 'fluid.' The British Government had stated to the Portuguese Government that Lobengula 'was "an independent

Atp. 214 sq. king," "undisputed ruler over Matabeleland and Mashonaland" who had not parted with his sovereignty, though his territory was under British influence; and in 1889 the Colonial Secretary wrote to Lobengula himself saying that he, Lobengula, "is king of the country" (i.e. of Matabeleland) "and no one can exercise jurisdiction in it without his permission."

The Committee considered that 'it would be idle to ignore the fact that, between the subjects of Her Majesty Queen Victoria and those of this native monarch, whose sovereignty she was pleased to recognize, there was in all juridical conceptions a great gulf fixed, which it would, perhaps, be only fanciful to try to span'; and that 'it cannot be said of the Matabele and the Mashonas in Lobengula's day that they had progressed towards a settled policy [? polity] further than this, that they acknowledged a sovereign in the person of a tyrant.' Nevertheless, the Committee held that, in those circumstances, the case raised 'no question of white settlement among aborigines destitute of any recognizable form of sovereignty'; and that equally little was there 'question of the rights attaching to civilized nations, who claim title by original discovery or in virtue of their occupation of coastal regions, backed by an unexplored interior'; that, in fact, the country had been acquired by conquest.

#### *Germany in South-west Africa.*

That the German Government attached great weight to treaties with the natives was well shown in the communication it made to the British Foreign Office in 1884 in regard to South-west Africa. The Imperial Government stated that it gave its protection, as soon as it was asked for, whenever  
75 S.P. 539. German settlements were founded on territory not previously occupied by another Power, and when the claim was supported by valid treaties which did not violate the rights of third parties. In the case of certain treaties with chiefs in South-west Africa, the treaties were, it stated, in due legal form; there was, therefore, no reason why protection should not be granted to those who claimed it.

#### *Great Britain and Germany in East Africa.*

F.O. Hand-  
book No.  
118, p. 27 sq.

In East Africa, the British and German Companies both prepared the way for Government protection by making treaties with the natives. From these treaties it is clear that the local

chiefs were considered to possess rights of sovereignty over their districts which they could cede to the Europeans.

In the German treaties, the chiefs are described in such terms as 'undisputed and sole and independent Ruler and possessor of the territory,' and they are said to cede 'all sovereign rights'; 'all the rights which, according to European ideas, are comprised in the sovereign rights of a Prince'; and again, 'all rights which, according to the law of European nations, are comprised in the idea of sovereignty,' including 'the right to have their own laws and administration, the right to levy customs and taxes, the right to maintain an armed force permanently in the country.' This view of the rights of the chiefs was also taken by the German Government. Thus the Charter of Protection granted to the Company by the German Emperor in February 1885 recited that treaties had been concluded with the chiefs by Dr. Karl Peters, 'by which these territories have been ceded to him for the German Colonial Society with sovereign rights over the same'—mit den Rechten der Landeshoheit.

77 S.P. 12-22.

Martens,  
2nd Series,  
XI. p. 468.  
77 S.P. 10  
& 1103.

### *The International Association and the Congo.*

Stanley made hundreds of treaties with the chiefs on the Congo on behalf of the International Association; and in the declarations exchanged between the Association and the Belgian Government, the Association declared that, 'by Treaties concluded with the legitimate sovereigns in the basin of the Congo and its tributaries, vast territories have been ceded to it with all the rights of sovereignty, with a view to the creation of a free and independent State.' The declarations exchanged by the Association with Great Britain and the United States also declared that territory had been ceded to the Association 'by Treaties with the legitimate Sovereigns.'

C. 4361  
(1886) 278.

75 S.P. 35.

### *Spheres of Influence.*

In the arrangements made between two or more Powers delimiting their respective 'spheres of influence' in Africa, it has generally been recognized that the territories in question are not necessarily *territorium nullius*. For instance, in the Treaty of the 14th June, 1898, between Great Britain and France, relating to their spheres of influence east of the Niger, each Power agrees that it will not, in the sphere of the other, *inter alia*, conclude treaties or accept sovereign rights or protectorates.

See  
Ch. XXIV.  
below.

29 Martens,  
122.

*Earlier Cessions by the Natives.*

Great  
Britain and  
Portugal  
and  
Delagoa  
Bay.

To show that the principle of cession by the natives is no new one, it may be mentioned that early cessions were appealed to (with what justification in the facts of the case we need not now inquire) by both of the Parties to the Delagoa Bay arbitration. Great Britain contended

C.-1361  
(1875) p. 3.

That the whole country south of the Dundas or Lorenzo Marques River and English River, and to seaward, was free and independent : the native inhabitants under their chiefs, retaining absolute dominion over, and possession of, these territories, over which the Portuguese exercised no jurisdiction.

That these chiefs, with the consent of the natives, and in exercise of their independent rights ceded by Treaty, in 1823, the sovereignty over these territories to the Crown of Great Britain.

*Id.* 85.

Portugal on her part urged that

Si le Portugal n'avait pas déjà acquis la souveraineté de la baie de Lourenço Marques, elle se trouverait comprise dans la cession faite en 1629 par le Roi du Monomotapa à la Couronne Portugaise.

Italy and  
Assab Bay.  
73 S.P. 1242 et.  
France and  
Mada-  
gascar.  
75 S.P. 155.

Again, Italy (in 1880) based her claims to sovereignty over Assab Bay upon cession obtained from the local sultans in 1869 ; and France (in 1882) claimed a protectorate over parts of North-west Madagascar in virtue of treaties made with native chiefs during the period 1840 to 1848.

*Great Britain in Oceania.*

Turning now to another part of the world, we will inquire how far the definition of *territorium nullius* that we arrived at in the preceding Chapter accords with practice in Oceania.

*Australia.*

14 A. C. at  
291.

Australia has usually been considered to have been properly *territorium nullius* upon its acquisition. Thus in the case of *Cooper v. Stuart*, an appeal from the Supreme Court of New South Wales which came before the Privy Council in 1889, Lord Watson, delivering the judgment of the Court, said :

There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory

practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.

To the same effect, the Select Committee of the House of Commons on 'Aborigines' reported in 1837 that the British settlements in what was then called New Holland were 'brought into contact with Aboriginal tribes, forming probably the least-instructed portion of the human race in all the arts of social life. Such, indeed, is the barbarous state of these people, the Report continued, 'and so entirely destitute are they even of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded.'

Parly.  
Papers,  
1837, Vol.  
VII. (425)  
p. 82.  
*See also*  
1845,  
XXXIII. (1).

As the facts presented themselves at the time, there appeared to be no political society to be dealt with; and in such conditions, whatever 'rudiments of a regular government' subsequent research may have revealed among the Australian tribes, Occupation was the appropriate method of acquisition.

*See p.*  
*above.*  
Whaler,  
48 etc.  
Thomas,  
Chs. VIII.  
& IX.  
Turner,  
Ch. X.

### *New Zealand.*

In annexing New Zealand, the British Government gave full effect to the sovereignty of the native chiefs and tribes. Their attitude was clearly set out in a dispatch which was written by the Secretary for War and Colonies in August 1839, shortly before the annexation. 'I have already stated,' runs the dispatch,

Parly.  
Papers,  
1840, Vol.  
XXXIII.  
(238).

that we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgment in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate predecessor, disclaims, for herself and for her subjects, every pretension to seize on the islands of New Zealand, or to govern them as a part of the dominions of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained.

In consonance with these principles, the rights of the British Crown were acquired by Cession, the treaty by which the North Island was ceded being made with the Maori Chiefs at Waitangi,

Treaty of  
Waitangi.

6 Hertslet, 578.

on the 5th February, 1840. The treaty recited that Her Majesty, 'regarding with Her Royal favour the native chiefs and tribes of New Zealand, and anxious to protect their just rights and property,' had appointed a functionary 'to treat with the aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands.' Article I. provided as follows:

The chiefs of the confederation of the united tribes of New Zealand, and the separate and independent chiefs who have not become members of the confederation, cede to Her Majesty, the Queen of England, absolutely, and without reservation, all the rights and powers of sovereignty which the said confederation or individual chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective territories as the sole sovereigns thereof.

6 Hertslet, 581.

Parly.  
Papers,  
1841, Vol.  
XVII.  
(311), p. 18.  
Jenks,  
Chs. VIII,  
IX. &  
XIII.

The South  
Island.  
Parly.  
Papers,  
1840, Vol.  
XXXIII.  
(288).

6 Hertslet 582.

Hight &  
Bamford,  
Ch. VII.

In the British proclamation issued on the 21st May, 1840, the sovereignty of the Queen over the North Island was based upon the Cession from the chiefs; and in later years, in disputes with reference to the proprietary rights of the chiefs, the Government repeatedly recognized the validity of the Treaty, by which rights of property were reserved.

As regards the South Island, the British representative was instructed that, if he should find the Island inhabited only by 'a very small number of persons in a savage state, incapable, from their ignorance, of entering intelligently into any treaty with the Crown . . . the ceremonial of making such engagements with them would be a mere illusion and pretence,' and that, in those circumstances, Her Majesty's sovereign rights over the South Island were to be asserted on the ground of discovery. In pursuance of these instructions, a second proclamation, also issued on the 21st May, 1840, asserted 'British sovereignty over all the islands of New Zealand'; but steps had then already been taken to obtain treaties of Cession with such chiefs as were found in South Island and Stewart Island.

### *Fiji.*

C.-1114  
(1875).  
F.O. Hand-  
book No.  
144, p. 22.  
Hansard:  
June 25,  
1872, col.  
217.

The same principle of Cession from the chiefs was adopted when the sovereignty over the Fiji Islands was acquired in 1874, the annexation proclamation being based upon the Instrument of Cession by which, as the proclamation stated, the chiefs had 'voluntarily and unconditionally ceded' to the Crown 'possession of and full sovereignty and dominion over the Fijian group of Islands, and over the inhabitants thereof.'

*British action in Australia, New Zealand and Fiji  
summarized.*

Bearing in mind the higher degree of political development of the Maoris and Fijians as compared with the Australians, particularly when the condition of the Australians as it appeared to the early settlers is recalled, it thus appears that the modes of acquisition adopted by Great Britain in the respective cases support our definition.

Jenks,  
Class. I. &  
VIII.

*The British Parliament and the Pacific Islanders.*

The sovereignty of the chiefs in the Pacific Islands has been impressively recognized in an Act of the British Parliament. The Pacific Islanders Protection Act, 1875, which empowers Her Majesty 'to exercise power and jurisdiction over Her subjects within any islands and places in the Pacific Ocean not being within Her Majesty's dominions, nor within the jurisdiction of any civilized power,' and also to erect a court of justice for British subjects in the islands of the Pacific, contains (Sect. 7) a saving of the rights of native tribes in the following terms :

28 & 39  
Vict. c. 51.

Nothing herein or in any such Order in Council contained shall extend or be construed to extend to invest Her Majesty, her heirs or successors, with any claim or title whatsoever to dominion or sovereignty over any such islands or places as aforesaid, or to derogate from the rights of the tribes or people inhabiting such islands or places, or of chiefs or Rulers thereof, to such sovereignty or dominion.

**Summary of the Evidence as to State Practice.**

As an induction from all these instances, extending over four centuries and derived from four continents, it appears that, on the whole, the European States, in establishing their dominion over countries inhabited by peoples in a more or less backward stage of political development, have adopted, as the method of such extension, Cession or Conquest, and have not based their rights upon the Occupation of *territorium nullius*. As among themselves, the European Powers have not disputed the rights acquired by one Power, whatever the method by which those rights were obtained, so long as their own interests were not thereby affected; and, in some cases, it has been recognized that a certain Power had the right to acquire

territory within a given area in the future. But such a recognition has not altered the actual nature of the acquisition. If the inhabitants have agreed to place themselves under the sovereignty of the acquiring State, it has been recognized as an act of Cession. If their country has been taken possession of by superior force against their will, the mode of acquisition has been regarded as Conquest.

See  
Oppenheim  
I. § 222.

No doubt, in many of the cases of Cession, the native chief did not realize what he was transferring under the treaty; but the fact that the form employed was that of Cession shows that the Power concerned did not consider that the territory was one that belonged to nobody. No doubt, also, in many cases the treaties were obtained under compulsion, but forced treaties are not unrecognized in international affairs. The Powers themselves, as we have seen, have in large numbers of cases accepted sovereign rights from the chiefs, and based their titles upon such cessions, and, unless one is prepared to argue that the maxim *Nemo dat quod non habet* has no application to such a case, it must be admitted that the chiefs themselves possessed those rights. 'The power of making an agreement,' it was urged on behalf of Great Britain in the Delagoa Bay arbitration, 'implies the ability to refuse to make such agreement, and is a mark and test of independence.'

C.-1891  
(1885), p. 7.

## CHAPTER V.

### INTERNATIONAL LAW AND NATIVE SOVEREIGNTY.

COMBINING the results of our review of the practice of States in the last Chapter with those of our theoretical investigations in Chap. III., the rule regarding appropriable territory can now be stated as follows :

The members of the International Family will not dispute the validity of the acquisition by one of them of territory in respect of which none of the others has a valid prior claim, and this recognition does not depend upon the method by which the acquisition has been made. If the territory is uninhabited, or is inhabited only by a number of individuals who do not form a political society, then the acquisition may be made by way of Occupation. If the inhabitants exhibit collective political activity which, although of a crude and rudimentary form, possesses the elements of permanence, the acquisition can only be made by way of Cession or Conquest or Prescription.

We have now to consider how far it is true, as is sometimes stated, that International Law has no place for rules protecting the rights of backward peoples, and that, therefore, such international rights as backward peoples have been recognized to possess were moral and not legal.

Although this view is now widely expressed in England, it is not, as we have already seen in Chapter III., so generally adopted by continental jurists, and it derives little support from the classical writers on International Law. Moreover, there have not been wanting in this country authorities who have maintained that International Law does, or should, extend its protection to independent peoples who are not of its community.

For instance, Phillimore referred to the doctrine 'that International Law is confined in its application to European territories' as a detestable one, and he maintained that the principles of international justice do govern, or ought to govern,

Rule  
regarding  
appropri-  
able  
territory.

See (h. III.  
above.

Are the territorial rights of backward races merely moral rights ?  
Westlake: *Collected Papers*, 143 sq.  
Oppenheim, I. § 222.  
Lawrence, § 74.  
See e.g. Bonfile, § 158.  
See Macdonell: *Jl. of Soc. of Comp. Legism.* XII. 280.  
Tyias, 16 *R.D.I.* 580.  
Lee-Warner, p. 62.  
Phillimore, I. §§ xix., & cxvii.

the dealings with the infidel community; that they are binding, for instance, upon Great Britain in her intercourse with the native Powers of India; upon France with those of Africa; upon Russia in her relations with Persia or America; and upon the United States of North America in their intercourse with the native Indians.

**The Berlin Conference.**  
C.-4361  
(1885),  
p. 65.  
*See also*  
pp. 78, 182,  
209 & 305.

Again, at the African Conference of Berlin, the Commission appointed to examine the draft of the declaration relating to freedom of commerce in the basin of the Congo and its affluents stated, in their report to the Conference, that the native populations, 'pour la plupart, ne doivent pas sans doute être considérées comme se trouvant en dehors de la communauté du droit des gens.' And if the Conference did not adopt as a rule of law the view put forward by the United States Plenipotentiary—the view that 'modern International Law follows closely a line which leads to the recognition of the rights of native tribes to dispose freely of themselves and of their hereditary territory'—it did not repudiate it.

**International Law cannot ignore native sovereignties.**

It is, of course, true that International Law has, in the main, been evolved out of the mutual relations of the advanced States who are considered to form the International Family. It is equally true that most of its rules are inapplicable to the conditions of backward peoples. It is, however, one of the admitted functions of International Law to lay down rules by which the goodness or badness of a territorial title claimed by a member of the International Family may be tested, and, in so doing, it would simply ignore facts if it were to declare that all the territory that has been acquired by members of the International Family, otherwise than from others of its members, has been acquired by the same process, and that process Occupation.

We have cited abundant evidence to show that advanced Governments do recognize sovereign rights in less advanced peoples with whom they come into contact, and do, in general, deal with such peoples on a treaty basis when acquiring their territory. In face of that evidence, and of such a pronouncement as that of the Judicial Committee of the Privy Council in the matter of the Southern Rhodesian lands, to which we have referred, any rule of International Law which regarded the territory of independent backward peoples as being under no sovereignty and belonging to nobody would not only not be based upon 'evidence of usage to be obtained from the action of nations' but would be in direct conflict therewith.

*See* p. 37  
*above.*  
*West Rand,*  
*etc. Co. v.*  
*Rand, [1905]*  
*2 K. B. 401. See*  
*Principles*  
*above, &*  
*Ch. XXI.*  
*below.*

But the degree to which recognition of the territorial rights of backward peoples is afforded in the present stage of development of International Law should be clearly appreciated. While International Law should and does recognize the rights of independent backward races to the extent of distinguishing those territories to which a title may be acquired by the legally and morally legitimate method of Occupation from those which, in the absence of consent on the part of the inhabitants, can be obtained only by Conquest—or through Prescription—it does not, at present, go further and say that an acquisition by Conquest is not legitimate. On the contrary, once a Conquest has become a *fait accompli*, International Law recognizes its results.

While International Law recognizes the sovereignty of the natives, it does not protect them from a war of Conquest.

From the point of view of international morality there may be much to be said on both sides as to the legitimacy or the justice of a particular war of conquest. But such a war is neither justifiable nor unjustifiable by International Law. Various attempts have been made to define just causes of war—as we have seen, Grotius and others have declared that it is not a just cause of war to claim lands on the ground of discovery when they are already occupied by backward peoples, and have endeavoured to define the conditions under which a forcible expropriation of the natives would be justifiable. But International Law is not yet in a position to adopt such a proposition as one of its rules. All it can do is to say that a particular area is not *territorium nullius*, and, in the absence of consent on the part of the natives, leave a State to justify its acquisition to public opinion as a conquest.

Hall, I. Ch. III.  
Oppenheim,  
II. §§ 81 &  
82.

## CHAPTER VI.

### ABANDONED AND FORFEITED LANDS.

Selden : *Mare Clausum*, I. Ch. IV. Grotius, II., III. XIX. (1). TERRITORY that has been occupied may again become *territorium nullius*, either because the sovereignty over it has been abandoned—in which case it is that species of *territorium nullius* which is known as *territorium derelictum*—or has been forfeited because the occupant has not done what is necessary to secure a good title.

#### *Abandonment.*

Abandonment involves *corpus* and *animus*. Pufendorf, IV. VI. XII. We will consider Abandonment first. Just as Occupation involves two elements, the physical act by which possession of the territory is taken, or the *corpus*, and the intention to retain the dominion so acquired, or the *animus*, so Abandonment is made up of the actual physical relinquishment of possession and the intention to give up the dominion.

The *corpus*. The Bahamas. *Colonial Office List*, 1926, p. 190. Tobago. *Ib.*, p. 444. The physical relinquishment of possession may be effected either voluntarily or under compulsion. The Bahamas were voluntarily abandoned by the Spaniards a few years after their discovery by Columbus, all the Carib inhabitants being transported to work in the Cuba mines. The settlement which had been formed in Tobago from Barbadoes in 1625 was forcibly expelled by Caribs; and similar treatment was subsequently meted out by Indians and Spaniards to a party of Dutch settlers on the same island.

The *animus* may be presumed after a reasonable time. Vattel, II. XI. The presence of the mental element in Abandonment has generally to be implied from the known facts of the case. In the absence of direct evidence on the point, a reasonable time must be allowed to elapse before an intention to abandon is presumed. Other things being equal, such a time would be longer in the case of a forcible expulsion than in one where the possession has been voluntarily given up. Where an expulsion has occurred under conditions which amount to a conquest by another State which has annexed the territory, the title of the previous occupant has, of course, been lost.

The question as to when abandonment ought to be presumed after a forcible expulsion arose in regard to the island of Santa Lucia. An English settlement had been formed in 1639, but in the following year the colonists were all murdered by the Caribs. The English made no attempt to re-establish their position, and in 1650 a French settlement was formed on the island under a grant from the King of France. The French settlers held their ground in spite of the efforts of the Caribs to expel them. In 1663 an English force drove the French settlers into the mountains, but at the Peace of Broda in 1667 the island was restored to France. Subsequently the matter was referred to Commissioners.

England and Santa Lucia.  
Colonial Office List, 1925, p. 469.  
Philmore, I. § CCLXI. Hall, II. II. p. 141.  
Oppenheim, I. § 247.

The French maintained that, after the English settlers had been murdered by the Caribs in 1640, England had *animus et facto*, and *sine spe redeundi*, abandoned the island, which was, therefore, vacant when the French seized it in 1650, so that it at once became theirs without the necessity of any prescriptive aid. The English negotiators contended that the dereliction of the English had been the result of violence, that they had not abandoned the island *sine spe redeundi*, and that, therefore, it was not open to occupation by France in 1650. By the Treaty of Utrecht, Santa Lucia was assigned to France.

In view of the fact that the English had not firmly established themselves in Santa Lucia in 1640, their inactivity during the succeeding ten years was, no doubt, sufficient to warrant the assumption that they had abandoned the island. But the case is different when it is only a matter of the temporary withdrawal of a well-established authority.

Temporary relinquishment of control.

Heffer, § 70.

The consideration that the relinquishment of control was only temporary was one of the points upon which the French President based his award in the Delagoa Bay Arbitration between Great Britain and Portugal in 1875. He found that the territories in dispute had been discovered by the Portuguese in the sixteenth century, and that they had occupied various points in the seventeenth and eighteenth centuries; that Portugal had always claimed rights of sovereignty over the region and the exclusive right of trading there, and had supported her claim by force of arms against the Dutch and the Austrians; that her pretensions had been recognized by Holland, Austria, and Great Britain; and that, even if the temporary weakening (*l'affaiblissement accidentel*) of Portuguese authority in 1828 had induced the English officer, Captain Owen, in good faith to consider that the local chiefs were really independent

Portugal and Delagoa Bay.  
C.-1361 (1875), 248.

of the Crown of Portugal, the treaties which he concluded with those chiefs were none the less contrary to the rights of Portugal.

Spain and  
British  
Honduras.

*Att.-Genl.  
for Brit.  
Honduras v.  
Bristowe*,  
6 A. C. 143.  
*Colonial  
Office List*,  
1926, p. 127.

In the case of British Honduras, a somewhat longer period than in the case of Santa Lucia seems to have elapsed between the abandonment of the country by Spain and the assumption of the sovereignty by Great Britain. It does not appear to have been inhabited by Spaniards; and the English, principally from Jamaica, resorted to it for the purpose of cutting the valuable woods. As late, however, as 1786, in the Treaty of London, in which certain privileges were granted to the British settlers, it was indisputably acknowledged to belong of right to the Crown of Spain. In 1798 the Spaniards made their last unsuccessful attack upon the English settlers, and then withdrew from the territory.

6 A. C. at  
148.

In *Attorney-General for British Honduras v. Bristowe and another*, the Privy Council found that up to 1798 'the sovereignty of the territory had undoubtedly remained in the Crown of Spain.' 'But,' they continued, 'no future attempt was made by the Spanish Crown to restore its authority, and its dominion seems to have been tacitly abandoned. The exact time when the Spanish Government can be said to have finally relinquished the territory, and the time when the British Crown assumed territorial sovereignty over it, are . . . both undefined. There certainly seems to have been an interval between the abandonment of Spanish and the assumption of British sovereignty, though the length of that interval cannot be determined.' Their Lordships were, however, of the opinion that, as early as 1817 at least, the British Crown had assumed territorial dominion in Honduras.

Intention  
to re-  
occupy  
expressed  
on  
abandon-  
ment.

In the cases noted above, no intention with regard to the abandonment had been expressed, and the question was whether an intention to abandon could be presumed. But even when the withdrawal has been accompanied by an expression of intention to retake possession, that alone is not sufficient to prevent the physical relinquishment of possession from developing into a full abandonment after a reasonable lapse of time.

England  
and the  
Falkland  
Islands.  
Phillimore,  
I  
§ 60XLVIII.  
Calvo, § 287.

When the English garrison abandoned the Island of West Falkland in 1774, they purported to conserve the rights of the Crown of England by leaving the British flag flying and attaching to the fort a lead plate upon which was engraved a notice to the effect that the Falkland Islands were the lawful possession of King George III.

In 1882 Great Britain again took possession of the Islands, in spite of the vigorous protests of the Argentine Republic. But it cannot be said that the notice left on the fort, which, moreover, appears to have been destroyed in 1781, was sufficient evidence, over the whole intervening period, of her intention to retake the islands, and it would appear that any rights she may have had in 1774 had been abandoned long before 1882.

F.O. Hand-  
book No.  
138.

### *Forfeiture.*

So far we have been considering cases in which the physical element in Abandonment has been present, and the question has been whether, after a certain time, depending on all the circumstances of the case, it was reasonable to suppose that there had also been an intention to abandon. But cases may occur in which the circumstances are such that an intention to abandon cannot be presumed, and even in which there has not been a complete relinquishment of possession, and yet the territory has again become open to Occupation.

As we shall see later on, International Law requires as a condition of the validity of an occupation that it should be rendered effective within a reasonable time. A State that has occupied a certain territory cannot therefore withdraw from it and prevent, for an unreasonable time, another State from establishing an efficient government there, merely by a repeated expression of its intention to resume its occupation in the future. And even where the physical possession of an occupied territory has not been entirely relinquished, but, after a reasonable time, the occupying State has not established within the territory such an administration as to render the occupation effective, it cannot claim to have perfected its title, and in such a case the territory is again open to Occupation.

See  
Ch. XIX.  
below.

For relin-  
quishing  
possession.

For not  
occupying  
effectively.

The reason for the forfeiture in these two cases is that a State has no right, by the mere repetition of an expression of its intention, or a merely fictitious occupation, to keep the territory without any authority for the protection of such persons as may live in it or resort to it. Jéze considers that, in all cases, seven years at least should be allowed for rendering an occupation effective. Twenty-five years has been suggested as a suitable period to allow from the date of a discovery. But no period applicable to all cases can be specified, and here again what is a reasonable time will depend upon all the circumstances of the case, such as the urgency of the need of governmental control

p. 284.

See  
Ch. XVIII.  
below.

See  
British  
Cases,  
Venezuela  
Arbitn.  
O.-9336  
(1899),  
p. 154.

in the territory, the degree to which the State claiming the territory has exercised control there, the difficulty of regaining possession or of rendering the occupation effective, and the relations that other States may have with the territory.

### *The Egyptian Soudan.*

See also  
Ch. XXIV.  
below.  
XII. *Camé.*  
Mod. Hist.  
Ch. XV.  
*Annual*  
Rep. 1884,  
387; 1885,  
344.  
F.O. Hand-  
book No.  
80, p. 30.

An interesting case in which, after the relinquishment of physical possession, an intention to reoccupy was repeatedly expressed in different ways, is that of the Egyptian Soudan. The withdrawal of the Anglo-Egyptian forces in 1885 was effected deliberately by the British and Egyptian Governments in view of the formidable rising of the Mahdi. Later in that year, however, the British Government announced its intention of reconquering the region, but complications in Europe led to the abandonment of the scheme.

In 1890 Germany, and in 1891 Italy, recognized part of the region as being within the British sphere of influence; and in 1894 Great Britain made a lease to King Léopold of a large portion of the sphere so recognized. On the latter occasion, 'the claims of Turkey and Egypt in the basin of the Upper Nile' were definitely recognized by Great Britain and King Léopold. Nevertheless, France took exception to the lease on the ground, among others, that it infringed the rights of the Sultan and the Khedive. 'For many years,' said the French Foreign Minister in August 1894, 'these provinces have been occupied and administered by Egypt, and, although the agents of the Khedive, in consequence of events beyond their control, have been obliged quite recently to abandon them for the moment, the Khedivial Government has never ceased declaring its wish to re-establish its authority there.'

O.-9064  
(1898).

In 1895, in the House of Commons, Sir Edward Grey, in order to strengthen the position which Great Britain claimed under the agreements with Germany and Italy, called in aid the claims of Egypt, towards which country, he said, Great Britain stood in a special position of trust. The following year an Anglo-Egyptian army advanced into the Egyptian Soudan, and, in September 1898, by its victory at Omdurman, reconquered the abandoned region.

For thirteen years the country had been under the sway of the Mahdi and his successor the Khalifa. Towards the end of that time a French force, under Major Marchand, had taken possession of the district round Fashoda. In the Anglo-French controversy which ensued, France now claimed that the region

had become *res nullius* by its abandonment on the part of the Egyptian Government; but Lord Salisbury, taking up the position which France herself had adopted a few years earlier, contended that the Egyptian title had merely been rendered dormant by the military successes of the Mahdi. 'How much title remained to Egypt, and how much was transferred to the Mahdi and the Khalifa, was,' he said, 'a question which could practically be only settled, as it was settled, on the field of battle. But their controversy did not authorize a third party to claim the disputed land as derelict. There is,' he added, 'no ground in international law for asserting that the dispute of title between them, which had been inclined one day by military superiority in one direction, and a few years later had been inclined in the other, could give any authority or title to another Power to come in and seize the disputed region as vacant or relinquished territory.'

C.-9068  
(1898).

It would be difficult to say whether the delay of the Egyptian Government to reconquer the country from which it had withdrawn had been sufficiently prolonged to render the region *territorium derelictum*. Eleven years is certainly a long time but, in view of the peculiar circumstances, it would perhaps be going too far to say that it was an unreasonable one. At all events, in August 1894 France still regarded the region as belonging to Egypt, and, although she altered her position in 1898, when she herself had taken possession of part of it, it is difficult to see how any change could have occurred in the condition of the territory between August 1894 and the early part of 1896 when the Anglo-Egyptian reconquest was commenced.

#### *Summary.*

To sum up: In order that a territory that has once been occupied shall have become *territorium nullius*, it must have been abandoned, i.e. its previous occupant must have relinquished the possession of it, and have, or have had, no intention of resuming such possession, or it must have been forfeited because it had not been occupied effectively. In the absence of any definite statement of abandonment and any expression of an intention to reoccupy, or to occupy effectively, a reasonable time, depending on all the circumstances, must be allowed to elapse before the territory can be regarded as abandoned or forfeited; but even when such an intention is expressed, it amounts to nothing more than an element to be considered in determining what is a reasonable time.

## CHAPTER VII.

### SEAS.

HAVING determined the characteristics that distinguish land as *territorium nullius* and open to acquisition by Occupation, we will extend our inquiry to the water, and consider how far the seas are *territorium nullius*, and to what extent they can be placed under any sovereignty.

#### Inland Waters.

Vattel, I. § 204.  
Twiss, § 174.  
See also Ch.  
XXVII. below.

The case of an inland lake or sea that does not communicate with the ocean is comparatively simple. Such a body of water takes the condition of the land surrounding it; and if that land is *territorium nullius* the enclosed water can be acquired by Occupation along with it.

#### The ocean.

With regard to the ocean, the well-known rule is that the open sea is *territorium nullius* and not susceptible of sovereignty, while a narrow marginal belt of water is under the same sovereignty as the adjacent land. But such a doctrine has not always been held or acted upon, and we will briefly review its history and endeavour to ascertain the reasons upon which it is based, and thus put ourselves in a position to discuss its present limitations, and certain alleged or apparent exceptions to the rule that no part of the open sea can be the subject of sovereignty.

#### History.

##### Early times.

Maine:  
*Int. Law*.  
Lect. IV. 76-7.  
Walker, § 92.

In early times, although, generally speaking, the use of the sea was free to all who were prepared to risk the danger from the pirates who abounded there, claims to sovereignty over it were not unknown. For example, according to Selden, the sea adjacent to the western coast of Palestine was, by the ancient Jewish law, considered to be under the dominion of Israel.

*Mare Clausum*,  
I. Ch. VI; see  
also VIII-XIII.

##### Roman Law.

\*

In the Roman law, the sea was placed with the air, running water and the seashore in the category of things which, by the law of nature, are common to all mankind.

\* *Just. Inst.*, II. I. I. Grotius, II. III. IX. (1). But see Selden: *Mare Clausum*, I. Chs. XIV. & XV.

In the Middle Ages, the principle that the sea could be subject to full rights of sovereignty in the same way as the land was held and acted upon almost everywhere in Europe. Thus Venice, in the thirteenth century, effectively exercised sovereignty over the Adriatic under a gift from Pope Alexander III. The Ligurian Sea was under the sovereignty of Genoa. And it was recognized that England possessed the right of 'making and establishing laws and statutes and restraints of arms' and 'all other things which may appertain to the exercise of sovereign dominion' over the English seas.

In the sixteenth century, Spain in the West and Portugal in the East claimed sovereignty and exclusive rights of navigation over vast stretches of ocean in virtue of bulls of Alexander VI and other Popes. When Drake returned from his voyage in the Pacific in 1580, the Spanish Ambassador complained to Elizabeth 'that the Indian Ocean was sailed by the English.' And some Dutch ships which entered the seas of the East Indies in 1597 were treated by the Portuguese as pirates.

The extravagant claims of Spain and Portugal were not, however, acquiesced in by the other maritime nations. 'Other Princes,' said Queen Elizabeth to the Spanish Ambassador, '... may also freely navigate that vast Ocean, seeing the use of the Sea and Ayre is common to all. Neither can any title to the Ocean belong to any people, or private man; forasmuch as neither Nature, nor regard of the public use permiteth any possession thereof.' The charters granted by the English and Dutch Governments in 1600 and 1602 to their respective East India Companies were, in themselves, formal repudiations of the Spanish and Portuguese pretensions.

But although Elizabeth, to refute the claims of Spain, used arguments which would support the freedom of the seas generally, England herself claimed dominion over the Channel, the North Sea and the seas outside Ireland, and, later on, from Cape Finisterre in Spain to Stadland in Norway. And her claim was not to a mere jurisdiction over individuals and shipping, but to absolute sovereignty. All foreign ships were required to strike their flag and lower their topsail in recognition of British sovereignty; and fishing was prohibited to foreigners who had not taken out English licences.

In the seventeenth century, sovereignty over the Baltic was claimed by Denmark and Sweden. By the Treaty of 1780, Sweden, Denmark, and Russia agreed to maintain it as a closed

Middle Ages.

Hall, § 40.

Nys: *Les*

*origines etc.*

Ch. XVI.

Walker, § 92.

Selden *op. cit.* I.

XVI.

Sixteenth  
and seven-  
teenth  
centuries.

Oppenheim,  
I. § 248.

Camden: -

Elizabeth,

II. 110.

Nys *op. cit.*

Ch. XVI. 382

Camden:

*ibid.* 110-7.

Walker, § 92.

Nys, XVI. 384.

Westlake,

I. IX.

Position at  
the begin-  
ning of the  
nineteenth  
century.

See per  
Grovo, J.,  
R. v. Kym,  
2 Ex. D.  
109.

sea, but England, France, and Holland declined to acquiesce in that arrangement.

By the beginning of the nineteenth century, it had become generally recognized that the only part of the ocean that could be subjected to an exclusive sovereignty was a marginal belt, which had a width usually reckoned at three marine miles from low-water mark and was subject to a right of innocent passage for the merchant ships of all nations. The justification for dominion over large portions of the sea had gone now that the seas were comparatively free from pirates. The more extensive claims to sovereignty had for a long time been disregarded by those nations who felt themselves strong enough to do so; and England, having obtained the mastery on the sea, was not inclined to admit any wide claims on the part of other nations, and allowed her own to fall into desuetude.

### *Behring Sea Arbitration.*

C.-6918-22,  
6040-51,  
7107  
& 7161  
(1893).  
70 S.F. 1273 *sq.*  
81 S.F. 1072 *sq.*  
82 S.F. 202 *sq.*  
Moore's  
Digest, I.  
891 *sq.*  
Ritt Cob-  
bett, I. 127  
C.-7107  
(1893),  
p. 10.

In 1821, however, a Russian ukase was issued in which these principles were disregarded. This ukase granted exclusively to Russian subjects the pursuits of commerce, whaling and fishery, and all other industries in Behring Sea, and forbade all foreign vessels, not only to land on the coasts and islands belonging to Russia, but also to approach them within less than one hundred Italian miles. The transgressor's vessel was to be subject to confiscation, along with the whole cargo. Great Britain and the United States at once protested, and—as was subsequently found in the arbitration between Great Britain and the United States—Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States [in 1867], Russia never asserted in fact or exercised any exclusive jurisdiction in Behring's Sea, or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters.'

79 S.F.  
1240 *sq.*  
Moore's  
Digest, I.  
808.

C.-7107  
(1893), p. 13.

After Alaska had passed under the dominion of the United States, although that Power expressly disavowed the doctrine that the Behring Sea should be pronounced *mare clausum*, Acts of Congress were passed under the authority of which British vessels were seized for killing seals in the open sea quite outside the limits of territorial waters. Fourteen British vessels were so seized between August 1, 1886, and July 15, 1889, at distances of from fifteen to one hundred and fifteen miles from land. On the question being referred to arbitration in 1898, it was found

by five out of the seven arbitrators—the two dissenting arbitrators being those appointed by the United States—that the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary 3-mile limit.' This decision was afterwards accepted as good law by the United States.

Cl.-7107  
(1863),  
p. 10.

Moon's  
Digest I.  
927.

Since the Behring Sea Arbitration, the principles that the open sea is *territorium nullius* and not open to acquisition, while the marginal belt is appropriable, have not been seriously questioned. We will endeavour to ascertain what is the reason for the difference between the rules in the two cases, and what are the present limits of those rules, and, to this end, we shall consider the opinions of writers from the time when the freedom of the open sea was hotly contested.

### Opinions of Jurists.

The doctrine of the freedom of the sea had been proclaimed by Angelo Ubaldus in the fourteenth century; and by Vasquez, Gentilis, and de Castro in the sixteenth. But the protagonists who stand out in the early history of the controversy are Grotius and Selden.

Nys, *op. cit.* Ch. XVI. 381 sq.  
Walker, pp. 246 & 257.

It was against the claims of Spain and Portugal that Grotius directed his *Mare Liberum* in 1609, repeating and elaborating his arguments in his principal work. He maintained that the sea, whether taken as a whole or as to its principal parts, cannot belong to private persons or to peoples, for it is so great that it is sufficient for all peoples for every use, either of drawing water, fishing, or navigation; and he argued that Occupation can only be applied to a thing which is bounded. But in those places in which it is not prohibited by the Law of Nations, the empire of a small portion of the sea might, he considered, belong to a person or a territory: to a person when he has a fleet which commands that part of the sea; to a territory in so far as those who sail in that part of the sea can be compelled from the shore as if they were on land. But even he who holds the sea by Occupation cannot prevent an unarmed and harmless navigation upon it. Grotius thus enunciated the principles of the territorial belt and of innocent passage.

Grotius, Ch. V.  
*De iure, &c.* II. II. III.

II. III. X.  
to XVII.

The contentions of Grotius were replied to by Selden in his *Mare Clausum*, which was written in support of the sovereignty of Great Britain over the British seas. Selden explains that

Selden.

**Preface.** by sea dominion he means a dominion in all respects similar to that over land; and he quotes a very large number of precedents and gives elaborate arguments in support of the two propositions to which the two parts of his work are respectively devoted.

**Preface.** In Book I. he sets out to prove 'That the Sea, by the law of Nature or Nations, is not common to all men, but capable of Private Dominion or property as well as the Land.' In the  
**I. Ch. XX.** course of his arguments he acknowledges the right of inoffensive passage, but maintains that this does not derogate from the dominion; and he comes to the conclusion that 'upon due  
**I. Ch. XXVI.** consideration of all those particulars which hitherto have been produced out of the Customs of so many Ages and Nations, and as well out of the Civil as the Common or Intervening law of most nations, no man (I suppose) will question but that there remains not either in the nature of the sea itself, or in the Law, either Divine, Natural, or of Nations, anything which may so oppose the private dominion thereof, that it cannot be admitted by every kind of law, even the most approved; and so that any kind of sea whatsoever may by any sort of law whatsoever be capable of private dominion.'

In Book II., Selden addresses himself to the proposition 'That the King of Great Britain is Lord of the Sea flowing about, as an inseparable and perpetual appendant of the British Empire.' He argues at great length that the ancient Britons, the Romans, the Saxons, the Danes, and the Norman and later kings all exercised dominion over the English seas; and he concludes:

**II. Ch.**  
**XXXII.**

And without question it is true, according to the collection of testimonies before alleged, that the very shores or ports of the neighbour-princes beyond sea are bounds of the sea-territory of the British Empire to the Southward and Eastward; but that in the open and vast Ocean of the North and West they are to be placed at the utmost extent of those most spacious Seas which are possessed by the English, Scots and Irish.

*(Why is the Territorial Belt appropriable, but not the Open Sea?)*

Later writers were almost unanimous in taking the view that the open sea could not, while the territorial belt might, be validly appropriated. They based their opinions upon different grounds.

By some it was contended that the reason for the different rules in the two cases lay in the fact that, while the occupation of the open sea is physically impossible, the territorial belt can be effectively controlled from the adjoining land. The portion of this contention which relates to the open sea has been variously explained.

Physical  
reasons  
suggested.

Thus Grotius argued that there is a natural reason which prevents the sea from being made property, namely, because Occupation can only be applied to a thing which is bounded, and as the sea cannot be enclosed it cannot be occupied. In another place, however, he said that the rule that the sea cannot be lawfully occupied is the result of institution not of natural reason; and we have already noticed that he considered that the empire of a small portion of the sea could be secured by a fleet commanding that part.

*Mare  
Liberum,  
Ch. V.  
De iure, etc.  
II. II. III. (2).  
II. III. X. (1).*

Twiss maintained that it is 'by Nature not capable of being reduced into the Possession of a Nation, since no permanent settlement can be formed upon its ever changing surface; neither is it capable of being brought under the Empire of a Nation, as no armed fleet can effectively occupy it in its full extent.'

§ 105.

Westlake says that the sea is not capable of occupation because 'the area over which a ship of war can exercise control from her momentary position is insignificant when compared with the vast expanse of the ocean, and her control even over that area is not permanent.'

I. VII.

On the other hand, Pufendorf and Vattel, while they maintained that there was no reason why any one nation should have exclusive rights over the open sea, both expressly stated that the occupation of the sea was physically possible; and the arguments based upon a contrary opinion would appear to be sufficiently refuted by the facts of history to which we have already referred.

IV. V. IX. & X.  
I. §§ 290-1.

The complementary contention, that the territorial belt is appropriable because, and only so far as, it is capable of effective control from the shore, has also been widely held.

Grotius, as we have seen, maintained that that part of the sea could be appropriated whereon navigators could be compelled from the shore as if they were on land.

Bynkershoek, in proposing that the width of this portion should extend as far as it could be reached by cannon-shot from the shore, supported the same principle:

*De Dom.  
Maris,  
Ch. II.*

Quare omnino videtur rectius, eo potestatem terrae extendi, quousque tormenta exploduntur, eatenus quippe cum imperare, tum possidere videmur. Loquor autem de his temporibus, quibus illis machinis utimur: alioquin generaliter dicendum esset, potestatem terrae finire, ubi finitur armorum vis; etenim haec, ut diximus, possessionem tuetur.

I. § 289.

Vattel considered that 'the dominion of a state over the neighbouring sea extends as far as her safety renders it necessary and her power is able to assert it.'

*See Selden,  
Mare Clausum,  
I. XXII,  
& Pufendorf,  
IV. V. III.*

Now it is no doubt true that, as in the case of land, the occupation of part of the sea must be effective in order to be valid. But a warship, stationed within a given area, that could readily be defined in terms of latitude and longitude, could as effectively control such a portion of the sea as a fort upon the mainland or an island can control the surrounding water. 'That this is so is especially clear when we take into account a principle which Westlake himself admits when treating of the marginal sea. 'It is not necessary,' he says, 'that every point of territorial water should at every moment be within the range of fire from a gun, even when we take guns aloft into account as well as those on shore. It is enough on *terra firma* that the sovereign's police should be adequate to render breach of his laws exceptional, and in general to punish it when it occurs. So much authority as that can be effectually provided in littoral seas and gulfs, and so far as it is possible to provide it the appropriation of those waters by the sovereign of the land is legitimate in principle.'

I. IX.

102 S.P. 940.

Again, the Hague Tribunal in its Award of 1909 dealing with the delimitation of a part of the maritime frontier between Norway and Sweden, gave weight to the performance by the respective countries, in the areas in dispute, of such acts as the following, viz.: exploitation of the lobster fishery; maritime surveys; the installation of a lightship and the fixing of buoys. Such acts are equally possible of performance in parts of the open sea.

It does not, therefore, appear that the difference between the rules for the open sea and for the marginal belt is due to the fact that the one cannot be effectively occupied while the other can. The broad principle that underlies the rules is not physical necessity. It is rather to be found in the consent of nations based upon their mutual convenience.

*The true  
reason, the*

It is to the advantage of all that the navigation of the sea should not be hampered. Such an end might have been attained

by treating the whole of the ocean as appropriable, but subject to the right of innocent passage. In the case of the open sea, however, such a dominion would not be worth the trouble of maintaining it, and the nations have consented to place that part of the ocean outside the class of territory that is open to acquisition. But to the marginal sea other considerations apply.

It has frequently been argued that no one has the right to appropriate to himself things that can be used by all without being exhausted; and that, since navigation and fishing in the open sea present these features, while, near the coast, the fish, pearls, amber, and other wealth are not inexhaustible, the territorial belt can be validly appropriated just as a tract of unoccupied country with undeveloped resources can be occupied and exploited. Among others who put forward this view are Pufendorf, Vattel, and Twiss.

Although, no doubt, this principle will account to some extent for the dominion over the territorial belt, it does not furnish a complete explanation, for it would equally justify the occupation of a part of the open sea where fish of a particular kind abound. For example, it would have justified the United States in closing Bering Sea in order to provide for the efficient working of the seal fishery. The decision of the Arbitral Tribunal with regard to that case did not, it is true, deal directly with the question of sovereignty—which the United States did not claim. But it appears to afford sufficient justification for saying that such a claim would not be upheld.

The true reason for the exercise of exclusive sovereignty over the territorial belt appears to be that it is necessary for the safety and efficient administration of the adjoining land. It is necessary to enable the State to protect itself from invasion, to preclude others from carrying on hostilities there, and for the purposes of customs and quarantine. Further, any other rule would render possible the existence of a state of anarchy among the fishermen and others who resort to these parts for the collection of the wealth of the sea, and a State cannot be expected to permit the possibility of such a condition of affairs in close proximity to its territory. Some or all of these reasons are advanced by Pufendorf, Vattel, Twiss, Westlake, Hall, and others.

\* See per Sir R. Phillimore, *R. v. Keyn*, 2 Ex. D. at 81; & per Lord Stowell, *Le Louis*, 2 Dodson at 245. Also *Secretary of State for India v. Chelikani Rama Rao*, 43 Indian Appeals 192; & Drago's dissenting judgment in the N. Atlantic Fisheries Arbitration, 103 S.P. 124.

consent of nations based upon their mutual convenience.

The exhaustible wealth of the marginal sea.

IV. V. VII.-X. I. § 287; & §§ 165 & 182 respectively.

The defence and efficient administration of the land.

IV. V. VII. & VIII.; I. §§ 288 & 289; §§ 165 & 172; I. Ch. IX; & II. Ch. II. § 41 respectively. Tartarin, § 28.

- IV. V. VII. 'It must needs be a disadvantage to any People,' said Pufendorf, 'that other Nations should have free access to their Shore with Ships of War, without asking their leave, or without giving security for their peaceful and inoffensive Passago. But,' he continued, 'we cannot, with any Accuracy, determine in general how large a space of the Sea ought to be allowed for such a defence, in respect of which it may be for the Safety and Interest of the Borderers to claim a distinct Dominion over it. Yet certainly it would urge a very unreasonable Fear and Jealousy, should any Kingdom barely on this account desire to extend their Sovereignty over the Sea for some hundreds of Leagues together.' He also considered that 'when Naval
- IV. V. VIII. Forces are once brought into common use, the parts of the Sea, so far as they serve only for a Defence or an Appendage, do without any special corporal Act, pass immediately under the Dominion of that People whose Shores they wash. For in this respect the Sea is to be looked on as an Increment of the Land.'

*Width of the Territorial Belt.*

- Since the true and sufficient reason for the special treatment of the territorial belt lies in the fact that its control is necessary for the protection of the adjacent land, it would seem that, if its width is to be governed by the reach of cannon-shot, the reason for such a rule would rest upon the ground that a State should be able to control that portion of the sea from which a shot fired from a ship could reach its shores. But it does not appear that exclusive control over so large an area is really necessary for protection. A State can take action against a hostile ship outside of its territorial waters; and some smaller width than the extreme range of cannon-shot would seem to be sufficient for the protection of a neutral State in time of war and for all the ordinary purposes of defence and administration.
- Westlake, I. VIII.
- Hall, II. II. §41. There is already in progress a movement in favour of extending the width beyond the limit of three marine miles—which is based upon the range of cannon in the eighteenth century, but seems to have been first definitely adopted by an international agreement in the Anglo-American Treaty of 1818.
- 13 Ann. 329. At its Paris Session in 1894, the Institute of International Law adopted resolutions putting the width at six marine miles, after a proposal to make it ten had been defeated by twenty-five votes to ten; a neutral State was to have power, in the
- Id. 290.

\* Drago, dissenting Judgment in North Atlantic Fisheries Arbitration, 108 S.P. 129. *Of. R. v. Keyn*, 2 Ex.D. at 204.

event of war, to extend its zone by declaration to the distance of cannon-shot from the shore; and the right of innocent passage was reserved. The draft Convention presented to the International Law Association at Stockholm in 1924 (but not yet finally adopted), however, adhered to the width of three marine miles. Spain and Italy have actually claimed six nautical miles, and Norway four; although for the purposes of her neutrality in 1914 Spain fixed the width of her belt at three miles.

See  
Clemenson  
in *Brit.  
Year Book  
of Int. Law*,  
1925, p. 144,  
70 S.P. 186-7.  
*I. Moore's Digest*  
706-10.  
Westlake, L.IX.  
108 S.P.  
497 & 589.

### *The Sovereignty over the Territorial Belt.*

Some writers, including Ortolan and Calvo, while admitting the existence of the territorial sea, deny that it is capable of absolute dominion and property, and allow only the right of jurisdiction. Such an opinion, however, is exceptional, and does not accord with present practice or with history.

*R. v. Keyn*,  
2 Ex. D. at  
185-92.  
*Sec. of State  
for India v.  
Chelakant  
Rama Rao*,  
43 Indian  
Appeals at 202.

### *Gulfs and Bays.*

There are a number of well-known and old-established cases in which gulfs and bays are claimed to be under the same sovereignty as the land enclosing them, from points at which they are considerably more than twice the width of the territorial belt across. Thus, in 1877, the Privy Council held that Conception Bay in Newfoundland, the entrance to which is twenty miles wide, had been so long exclusively occupied by Great Britain that it had become by prescription part of British territory. But upon the general question as to the extent of a bay that can be regarded as belonging to the adjoining territory, their Lordships did not find it necessary to pronounce. It did not appear to them 'that jurists and text writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the state possessing the adjoining coasts'; and they could not find that it had ever been made the ground of any judicial determination.

*Pitt Cobbold*,  
144.  
*Direct U.S.  
Cable Co.  
v. Anglo-  
American  
etc. Co.*,  
2 A. C. 304.

2 A. C. at  
420.

In her dealings with France, Germany, and the United States, Great Britain has taken ten miles as the width of a territorial bay for fishery purposes. This was also the width adopted in the North Sea Fisheries Convention between Great Britain, Belgium, Denmark, France, Germany, and the Netherlands; and the Hague Tribunal in 1910 proposed ten miles in its award in the North Atlantic Coast Fisheries Arbitration—although the Tribunal considered that the proposal could not

75 *Hartalet*,  
194 *eq.*

103 S.P. 117.  
105 S.P. 287.

13 Ann. 329.

108 S. P.  
497 & 489.

be regarded as embodying a rule of law—and the parties to the Arbitration (Great Britain and the United States) adopted the proposal. The Institute of International Law in 1894 declared in favour of twelve marine miles, or twice the distance then proposed by the Institute for the normal width of the territorial belt. Spain claims the whole of a bay up to a width of twelve, and Italy up to a width of twenty, marine miles.

Thus, although it would not be safe to rely upon the cases of the wide bays over which sovereignty has been actually exercised for a long period to justify a new appropriation, it is arguable that such an appropriation, provided it did not infringe any rights hitherto regularly exercised by foreigners, would be valid in the case of a bay ten miles or less in width. In such a case the territorial belt would be measured seawards from a line drawn across the bay at the shortest distance from the sea at which it possessed this width.

Inland seas  
communicating with  
the ocean.  
Vattel, § 204.  
Twiss, § 174.  
¶

An inland sea that communicates with the ocean only through a narrow channel may be regarded as a gulf or bay and should, apparently, follow the same rules.

### *Straits.*

Westlake,  
I. IX.C.-735  
(1873).

The territorial water of a State bordering a strait connecting two parts of the open sea should, it would seem, be governed by the same rules as the territorial belt along the ocean. But Great Britain and the United States have fixed the boundary line between their respective possessions on the west coast of North America down the centre of the Strait of Juan de Fuca, which is fifteen miles wide on the average, and, where it meets the Pacific Ocean between the territories of the two Powers, has a width of ten and a half miles.

### *Appropriability of parts of the Open Sea.*

We will now apply the principles that we have found to govern the appropriability of the marginal sea in order to ascertain whether there are any exceptions to the rule that the ocean, outside the limits we have been considering, is not appropriable. In this connection we will deal with five cases, viz. :

- (1) The construction of fortified places in the open sea.
- (2) The construction of lighthouses and similar unfortified places in the open sea.

¶ But see Oppenheim, § 262.

- (3) The utilization of the surface of the bed of the sea.
- (4) Accretions to the land.
- (5) The utilization of the soil beneath the bed of the sea from the adjoining land. This is not properly an appropriation of the sea itself, but it will be convenient to consider it here.

### *Forts in the Open Sea.*

From a preliminary consideration, it would seem to follow that the mere erection of a fort in the open sea—for example, upon an isolated rock—will not be sufficient to take the surrounding water out of the operation of the rule that the open sea is not appropriable, for it would come to the same thing as stationing an armed vessel in the same position. And this conclusion is confirmed by an application of the principles governing the existence of the territorial belt. We have seen that the appropriability of that belt is based essentially upon the necessity for the protection of the adjoining land. Now a fort standing alone in the open sea cannot be regarded as essential to the protection of any land, and there appears, therefore, to be no reason for treating the water around it differently from the rest of the high seas.

From a passage in the judgment of Chief Justice Cockburn in *R. v. Keyn* (*The Franconia*), it might appear that he was of a different opinion, for he said :

2 H. L.  
at 118-9.

It does not appear to me that the argument for the prosecution is advanced by reference to encroachments on the sea, in the way of harbours, piers, breakwaters, and the like, even when projected into the open sea, or of forts erected in it, as is the case in the Solent. Where the sea, or the bed on which it rests, can be physically occupied permanently, it may be made subject to occupation in the same manner as unoccupied territory. In point of fact, such encroachments are generally made for the benefit of the navigation ; and are therefore readily acquiesced in. Or they are for the purposes of defence, and come within the principle that a nation may do what is necessary for the protection of its own territory.

Sir Charles Russell seems to have implied in his oral argument in the Behring Sea Arbitration that these remarks have reference to the open sea as distinguished from the territorial belt. But although the Chief Justice mentions the open sea, it does not appear that he was using that term with its technical meaning, but rather that he had in mind the case of a fort standing out of the water in the territorial belt. For he was considering whether the criminal law of England extended over

Moore's  
Int. Arbitr.  
Hist. I. 312.

Small  
fortified  
islands in  
the open  
sea.

I. IX.

that belt, he specially mentions the Solont, which is territorial water, and it is difficult to see how his reference to the 'purpose of defence' can apply to the open sea in its technical sense.

Carrying the matter a step further, we will suppose that the fort is erected on a small island outside the limits of territorial waters. Westlake considers that in such a case the island should be regarded as surrounded by a territorial belt of water. 'The area of the land on which a strip of littoral sea is dependent is,' he says, 'of no consequence in principle. Guns,' he continues, 'might be planted on a small island, and we presume that even in practice an island, without reference to its actual means of control over the neighbouring water, carries the sovereignty over the same width of the littor all round it as a piece of mainland belonging to the same state would carry.'

Now it is submitted that if the island amounts to little more than a barren rock, the case is not different from the one we have just considered. Sovereignty over the surrounding sea cannot be necessary for defence unless the island is occupied for some intrinsically useful purpose to be carried on upon it. If the occupation serves such a purpose, even if it is only the collection of guano or the provision of a coaling station, it is presumed that, for its protection, a belt of the usual width all round it should be considered territorial water. But if the island is occupied merely in order to fortify it, the grounds upon which the territorial belt is appropriable do not exist, and the sovereignty of the occupant should not extend over the surrounding sea; in fact this case also amounts to nothing more than the positioning of an armed vessel at a particular point in the open sea. Westlake appears to have based his view in part upon the decision of Lord Stowell in the case of *The Anna*. That decision, however, went upon the principle of alluvium and increment, and the little mud islands were considered to be the natural appendages of the mainland, so that it does not appear to be applicable to the case of barren islands in the sea not formed by alluvium and increment.

I., IX. 180  
(note 1).

See Ch. II.  
above.

#### *Lighthouses and other Unfortified Posts in the Open Sea.*

In the course of his oral argument in the Behring Sea Arbitration, Sir Charles Russell said that, 'If a lighthouse is built upon a rock or upon piles driven into the bed of the sea, it becomes, as far as that lighthouse is concerned, part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has incident to

Moore's  
Int. Arbitn.  
Hist. I.  
800-1.

it, all the rights that belong to the protection of territory—no more and no less.' 'The right to acquire by the construction of a lighthouse on a rock in mid-ocean a territorial right in respect of the space so occupied is,' he continued, 'undoubted; and therefore I answer my friend's case [which supposed a lighthouse in waters outside the three-mile limit] by saying that ordinary territorial law would apply to it.'

Westlake considers that 'it would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighbouring sea, could be made the source of a presumed occupation of it converting a large tract into territorial water,' but that it might be 'fair to claim an exclusive right of fishing so near the spot that, without the light, fishing there would have been too dangerous to be practicable.' I. IX.

Now, considering first the question of sovereignty over the surrounding water, although we agree with Westlake's conclusion on this point, it appears to us to rest upon other grounds. A control sufficient to render the occupation effective could, apparently, be exercised by placing an armed vessel upon the part of the sea in question, so that the fact that it may be impossible to fortify the lighthouse would not, by itself, be sufficient to render the surrounding water inappropriable. The principle underlying this case appears to be the same as that governing the one we have just considered, and if a rock or barren island is not occupied for its own sake, but merely to facilitate fishing and navigation in the surrounding ocean, it does not appear that this would be a sufficient justification for extending the sovereignty of the occupying State over those waters.

Secondly, in regard to the exclusive right of fishing, it is difficult to see how the mere building of the lighthouse, which is not sufficient to render the surrounding waters territorial, takes this case out of the operation of the principle underlying the decision in the Behring Sea Arbitration. Although the fishing off the Seven Stones at the mouth of the Bristol Channel would be dangerous without the lightship which Trinity House maintains there, no exclusive right in the fishing is claimed for British fishermen, and there appears to be no difference in principle between establishing a lightship in a particular position and building a lighthouse upon a barren rock or upon piles driven into the sea-bottom. The case appears to be one to be dealt with by Convention between the States interested, for which precedents are not lacking.

Westlake,  
I. V. 119.

*E.g.*  
Oppenheim,  
§ 283.  
15 Martens,  
794.

*Surface of the Bed of the Sea.*

The best-known cases in which a claim is made to the surface of the bed of the sea outside territorial waters are in reference to the pearl fisheries off Ceylon and in the Persian Gulf. Westlake regards this as an occupation of the bed of the sea, and states that 'in that character the pearl fishery will be territorial even though the shallowness of the water may allow it to be practised beyond the limit which the state in question generally fixes for the littoral sea . . . and the territorial nature of the industry will carry with it, as being necessary for its protection, the territorial character of the sea at the spot.'

Pearl  
fisheries.  
I. IX.

C.-6920  
(1893),  
93 & 94.

In the British counter-case in the Belung Sea Arbitration it was stated that 'the claim of Ceylon is not to an exceptional extent of water forming part of the high seas as incidental to the territorial sovereignty of the island, but is a claim to the products of certain submerged portions of land, which have been treated from time immemorial by the successive Rulers of the island as subjects of property and jurisdiction.' In his argument in the same case, Sir Charles Russell said that 'it was an undoubted fact that for many generations the owners of the territory of Ceylon had, with the acquiescence of all other powers of the world, been allowed to exercise dominion in respect of those fisheries,' and he maintained that the case amounted to the 'occupation of a small portion of the bottom of the sea,' which could be referred to considerations of 'exclusive possession, contiguity to the shore, and the manner in which the fisheries were themselves carried on.'

Moore's  
Int'l. Arbitr.  
Hist. I.  
901-2.

ib. 865.

On behalf of the United States, it was argued that the only way in which the bottom of the sea can be occupied is by buoying it where bottom can be reached, and establishing a naval force there, and excluding the citizens of other nations from it; and that it was not possible to defend any right like that over the high seas.

ib. 902.

Sedentary  
and free-  
swimming  
fisheries.

Sir Charles Russell contended that 'there was undoubtedly a warrant in law for the distinction, just as there was an obvious distinction in fact, between such a fishery, whether pearl, coral, or oyster, and a fishery dependent on the pursuit of a free-swimming fish in the ocean.' But since in both cases the fishing is really conducted from the surface of the sea, and such police and other control as is exercised can only be exercised from there, it is difficult to see any real difference in principle between the two cases; and the occupation of a part of the surface of

the bottom of the sea would appear in practice not to differ from an occupation of part of the open sea itself.

It thus appears that the claims to the pearl fisheries of Ceylon and the Persian Gulf, and, according to Sir Cecil Hurst, certain other sedentary fisheries to which he draws attention, can be sustained only on the prescriptive ground that they date back to a time when dominion over the open sea was recognized. They cannot, therefore, be regarded as precedents that would justify a new occupation of a portion of the surface of the bed of the sea outside territorial waters. If it is necessary to exercise some control over those who resort to other particular parts of the open sea to gather the natural wealth there, this should be provided for by convention between the interested Powers, whether that wealth is on the bed of the sea or in the superincumbent waters.

New occupations of sedentary fisheries now unjustifiable.

Sir Cecil Hurst in *Brit. Handbook of Int. Law*, 1923-4.

Hall: *Foreign Powers* etc. 243 (note).

Moore's *Int. Arbit. Hist.* I. 901.

Vattel, I. § 287. Oppenheim, § 261 (note).

#### *Appropriations of the Open Sea by Accretions to the Land.*

The width of the territorial belt is usually measured from low-water mark, and if, by additions to the land, the line of low-water mark is moved farther out into the sea, a corresponding additional area of the open sea will have passed under the dominion of the sovereign of the adjoining land. The additions to the land may be made artificially, as by building harbours, piers or breakwaters; or they may be due to the operation of natural causes, as by the deposition of materials from a river where it enters the comparatively still waters of the sea. Moreover, if islands are formed within the territorial belt, this will, as we have seen, deflect the seaward edge of the belt so as to bring a larger area of the sea under the dominion of the sovereign of the adjoining land.

Oppenheim, I. §§ 220-223.

Bluntschli, § 204.

*R. v. Keyn*, 2 Ex. D. at 108.

*See* Ch. II. above.

#### *The Soil beneath the Bed of the Sea.*

The soil beneath the bed of the sea can be reached directly from the adjacent land, and not only through the superincumbent water as in the case of oyster and similar beds on the sea-bottom. Tunnels and mines starting from the land can extend under the territorial belt and farther out under the open sea without interfering with the freedom of the sea, and in this way part of the soil beneath the bed of the open sea may be appropriated. Although mines have been extended out from the land under territorial waters, it does not appear that any appropriation of the soil beneath the open sea has actually been

*R. v. Keyn*, 2 Ex. D. at 109.

The  
Channel  
Tunnel.

made hitherto in this way. But when it was proposed to construct a tunnel under the Channel between England and France it does not seem to have been doubted that the portion of the bed of the sea through which the tunnel would pass could be so appropriated.

68 S.P. 458 *sq.*

To construct the Channel Tunnel, two Companies were formed, one English and the other French, to build the halves of the tunnel adjoining their respective countries; and a Commission was appointed by the British and French Governments jointly to consider the matter. In their report, dated May 31, 1876, the Commissioners put forward the draft of a treaty which they suggested should be entered into by the two Governments.

67 S.P. 51 *sq.*

The proposed treaty provided that the boundary between England and France in the tunnel should be half-way between low-water mark on the coasts of the respective countries, and that such boundary should have reference to the tunnel and submarine railway only, and should 'not in any way affect any question of the nationality of, or any rights of navigation, fishing, anchoring, or other rights in, the sea above the Tunnel, or elsewhere than in the Tunnel itself' (Art. 1). Each Company was to be 'responsible for keeping in good and substantial repair the portion of the Submarine Railway situated within its own country'; and in case of default the two Governments, on the recommendation of the international Commission, were to have power, 'each in its own country, to execute, as may seem right, all necessary works and repairs' (Art. 7). The concession granted by each Government was to be for a term of ninety-nine years from the opening of the railway, and, on the termination of the concession, each Government was to become possessed of all the rights of the Company established on its territory in and over the submarine railway in such country (Art. 8). But (Art. 12) after the end of thirty years, each Government was to have the right to purchase the undertaking of the Company established on its territory, after a joint agreement between the two Governments; and, in the event of purchase, the rights of each Government in and over the soil, works, and undertaking were to be 'limited to its own territory as defined in Art. 1.' Each Government was to have the power to damage or destroy the works of the tunnel in its territory, and also to flood the tunnel with water (Art. 15). It is clear from this draft that the acquisition of complete rights of sovereignty and property over a portion of the soil beneath the bed of the sea outside territorial waters was contemplated,

Oppenheim has suggested five rules for the occupation of the subsoil beneath the bed of the open sea. According to these, the subsoil may be acquired by occupation starting from the subsoil beneath the territorial belt of the occupying State and not extending into the subsoil beneath the territorial belt of another State; but the freedom of the open sea must not be thereby interfered with.

Oppen-  
heim.  
I. § 287 (c).

### Summary.

Summing up the conclusions at which we have arrived in this Chapter, we may say that :

(1) The following are susceptible of sovereignty along with the adjacent land :

(a) Inland seas which are not connected with the ocean, or are connected with it only through a channel which is not more than ten marine miles across and perhaps must be considerably narrower.

(b) The territorial or marginal belt, which extends over the ocean to a distance of at least three marine miles from the mainland, or from an island which is being occupied in order to carry out some useful purpose thereon—so that dominion over the surrounding water is necessary for its protection—or has been formed by alluvium and increment from the adjoining mainland; with a possible extension in the case of some bays which are not more than ten marine miles across, and a more doubtful extension in the case of some straits.

(c) The soil beneath the bed of the open sea, by starting from beneath the territorial belt.

(2) Sovereignty over the open sea itself, i.e. outside of the limits referred to in paragraph 1 (b), can now be acquired only through accretions to the land, which extend the seaward edge of the territorial belt over what was previously part of the open sea. The cases of certain sedentary fisheries over which sovereignty is admitted can be explained on the prescriptive ground that they date from the time when the open sea was considered to be susceptible of sovereignty.

## CHAPTER VIII.

### DECLARATIONS AND CONVENTIONS AGAINST PARTICULAR ACQUISITIONS, AND HEREIN OF THE MONROE DOCTRINE.

IN this Chapter we shall consider whether there are any territories that cannot be lawfully acquired, by whatever method, either by particular States or by any State.

Only the open sea is legally non-acquirable for all States.

We saw in the preceding Chapter that the open sea, although it is *territorium nullius*, is not now open to acquisition, save through the operation of the very special and restricted process of accretion to the adjacent land. The open sea was at one time regarded as susceptible of sovereignty, but, by the mutual consent of the Members of the International Family, its occupation, though physically possible, is now illegal.

Acquisitions illegal for particular States ;

See Ch. XXIV. below.

Apart from the open sea, there is no territory the acquisition of which is denied by the general law to all States, provided an appropriate mode of acquisition be adopted in each instance. In some cases, however, a State has bound itself, by treaty with another State or other States, not to make a particular appropriation or particular appropriations.

Hall : *Foreign Powers, etc.* § 101. and politically inexpedient for others.

For example, in the various arrangements that have been made in regard to 'spheres of influence,' each contracting Power agrees that it will not make acquisitions within the sphere assigned to the other ; and although within the sphere of one Power there may be areas that are legally *territoria nullius*, or countries whose sovereigns may be willing to cede them to the other Power, it would not be lawful for that other Power to acquire those areas or countries during the subsistence of the treaty. By third States, such acquisitions could be lawfully made ; but as the contracting Powers, by concluding the treaty, have virtually announced their intention of appropriating the territories within their respective spheres, other States would probably consider it politically advisable to

abstain from making acquisitions therein, at all events for a reasonable time after the announcement.

In other cases, two or more States have agreed together that neither or none of them will acquire sovereign rights over certain territory.

For example, Great Britain and France, by Declaration made in 1862, engaged reciprocally to respect the independence of the Sultan of Muscat (Oman). In 1899, the Sultan granted to the French Government a lease of a port for use as a coaling station. A vigorous British protest followed, and the lease was cancelled. *Vis-à-vis* the Sultan, the British demand for cancellation was put upon the ground that the grant constituted a violation of the Sultan's undertaking of March 1891 against ceding, selling or mortgaging territory, or otherwise giving it for occupation, save to the British Government. The French Government, on the other hand, were induced to accept the British view that the Declaration of 1862 'precludes either Government from accepting any cession or lease of Muscat territory.'

Great Britain and France and Muscat. 57 S.P. 785. F.O. Handbook No. 76, p. 41 sq. Parly. Debates, vol. 87, cols. 204 sq. & 427 sq.; vol. 88, col. 202.

France also granted the use of her flag to certain Muscat dhows, and the Court of Arbitration which sat at The Hague in 1905 to consider questions connected with that grant, while it found that the mere grant was not contrary to the Franco-British Declaration, held that any withdrawal by France of subjects of the Sultan from his sovereignty or jurisdiction would be in contradiction with the Declaration.

98 S.P. 113. Col. 2730 (1905).

Of a similar nature was the understanding arrived at between Great Britain, Germany, Austria-Hungary, France, Italy, Japan, Russia, and the United States in 1900, when those Powers agreed among themselves, in terms of varying bindingness in their several cases, that they would not 'make use of the present complication to obtain for themselves any territorial advantages in Chinese dominions,' and would 'direct their policy towards maintaining undiminished the territorial condition of the Chinese Empire.'

The Powers and Chinese territory. 94 S.P. 397 sq. F.O. Handbook, No. 87, p. 50.

Again, a State may, by a simple declaration, give notice that it will not allow any other Power to take possession of certain territory. Such a declaration would not affect the question from the legal point of view, but other nations might consider it politically expedient to take it into account.

Declaration by a single State against certain occupations.

Thus, while Great Britain has shown that she does not herself desire to annex territory on the Persian Gulf, she is vitally concerned that no other Power shall establish itself on

F.O. Handbook No. 76, pp. 87 sq., 78.

this approach to her Indian Empire; and in 1903, and again in 1907, it was declared on her behalf that 'we should regard the establishment of a naval base or a fortified port in the Persian Gulf by any other Power as a very grave menace to British interests, and we should certainly resist it by all the means at our disposal.'

*The Monroe Doctrine.*

The Monroe Doctrine, at all events as it is generally regarded outside America, is also a declaration of this kind. According to one part of this doctrine, the United States announce that they will not tolerate any fresh acquisitions of territory on the American continent by European Powers. The Doctrine is of considerable importance, and it appears desirable to consider it in some detail.

The occasion of its enunciation.  
See Ch. VII. above.  
Taylor, §109.  
82 S.F. 263.

The immediate cause of the enunciation of the Monroe Doctrine was two unconnected circumstances. In 1821, the Czar of Russia put forward a claim to exclusive rights over part of North America down to the 51st degree of north latitude. In the course of the subsequent controversy between the United States and Russia upon the matter, Mr. Adams, at that time the United States Secretary of State, told the Russian Minister, on July 17, 1823, that the United States would 'contest the right of Russia to any territorial establishment on this continent,' and would 'assume distinctly the principle that the American continents are no longer subjects for any new European Colonial establishments.' This position the British Cabinet refused to accept, as 'Great Britain considered the whole of the unoccupied parts of America as being open to her future settlements in like manner as heretofore.' The second circumstance was the fact that, in 1823, the Holy Alliance was considering the question of armed intervention in order to put back the revolted Spanish colonies in America under the dominion of Spain.

President Monroe's Message of 1823.

These two sets of circumstances gave rise to two separated portions of the Message which President Monroe sent to Congress on December 2, 1823. The earlier portion, relating to future colonization by European Powers in America, was called forth by the claims of Russia. The later one, directed against European intervention in the affairs of the Governments which had recently declared their independence of Spain, had special reference to the proposals of the Holy Alliance. Both parts of the Doctrine have been considerably extended since they were

first formulated. With the second part, and its development into the doctrine of the primacy of the United States upon the American continent, we are not here concerned, and we shall consider only the first part of the Doctrine which, in President Monroe's message, was couched in the following terms :

See 87 S.P.  
1082.

At the proposal of the Russian Imperial Government, made through the minister of the Emperor residing here, a full power and instructions have been transmitted to the minister of the United States at St. Petersburg, to arrange, by amicable negotiation, the respective rights and interests of the two Nations on the north-west coast of this Continent. A similar proposal had been made by His Imperial Majesty to the Government of Great Britain, which has likewise been acceded to. The Government of the United States has been desirous, by this friendly proceeding, of manifesting the great value which they have invariably attached to the friendship of the Emperor, and their solicitude to cultivate the best understanding with His Government. In the discussions to which this interest has given rise, and in the arrangements by which they may terminate, the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American Continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European Powers.

11 S.P. 6.

Two years later, in a Message to Congress relative to the congress of American Nations to be assembled at Panama, President Adams said :

President  
Adams's  
Message  
of 1825.

An agreement between all the Parties represented at the Meeting, that each will guard, by its own means against the establishment of any future European Colony within its Borders, may be found advisable. This was, more than 2 years since, announced by my Predecessor to the World, as a principle resulting from the emancipation of both the American Continents. It may be so developed to the New Southern Nations, that they will all feel it as an essential appendage to their Independence.

13 S.P. 391.

From this Message, it was suggested that the reference in President Monroe's Message to 'future colonization' was not intended to preclude the European Powers from colonizing such parts of America as were not then claimed by civilized Powers. But any doubts on that point were set at rest by President Polk who, in his Message of December 2, 1845, said :

Taylor, § 109.

President  
Polk's  
Message  
of 1845.  
33 S.P. 213.

Near a quarter of a century ago, the principle was distinctly announced to the world, in the annual message of one of my pre-

decessors, that 'the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European Power.' This principle will apply with greatly increased force, should any European Power attempt to establish any new colony in North America. In the existing circumstances of the world, the present is deemed a proper occasion to reiterate and reaffirm the principle avowed by Mr. Monroe, and to state my cordial concurrence in its wisdom and sound policy. The reassertion of this principle, especially in reference to North America, is, at this day, but the promulgation of a policy which no European Power should cherish the disposition to resist. Existing rights of every European nation should be respected; but it is due alike to our safety and our interests, that the efficient protection of our laws should be extended over our whole territorial limits, and that it should be distinctly announced to the world as our settled policy, that no future European colony or dominion shall, with our consent, be planted or established on any part of the North American continent.

Is the  
Doctrine  
a rule of  
law?  
See  
Oppenheim  
in the  
Am. Jl. of  
Int. Law,  
II. 853.  
President  
Cleveland's  
Message  
of 1895.  
87 S.P.  
1211.

This obviously covers, and has always been regarded as covering, even the case of the occupation by European Powers of territory which, according to the rules of International Law, may be *territorium nullius*, and attempts have been made by American statesmen and authors to show that the Monroe Doctrine is itself a rule of International Law. For example, President Cleveland, in his Message of December 17, 1895, relative to the boundary dispute between Great Britain and Venezuela, said that:

It may not have been admitted in so many words to the code of international law, but since in international councils every nation is entitled to the rights belonging to it, if the enforcement of the Monroe doctrine is something we may justly claim it has its place in the code of international law as certainly and as securely as if it were specifically mentioned, and where the United States is a suitor before the High Tribunal that administers international law, the question to be determined is whether or not we present claims which the justice of that code of law can find to be right and valid.

The Monroe doctrine finds its recognition in those principles of international law which are based upon the theory that every nation shall have its rights protected and its just claims enforced.

Taylor,  
§114.

Taylor says that Great Britain and France have already acquiesced in the Doctrine, and that when all the other members of the International Family who are interested in the subject

similarly recognize it, it 'will become a part of the public law of the world, if it is not so already.'

In these cases, the President and the jurist had more immediately in view that branch of the Doctrine which deals with the intervention of European Powers in the affairs of independent American States. But the principles they contended for have been claimed in America to apply to both branches. Thus Mr. Olney, the United States Secretary of State, in the course of the correspondence with Great Britain on the subject of the Venezuelan boundary, wrote in 1895 :

Mr. Olney.

That America is in no part open to colonization, though the proposition was not universally admitted at the time of its first enunciation, has long been universally conceded.

Ci-7028  
(1896), p. 16.  
87 S.P.  
1077 & 8.

But Lord Salisbury, in his reply, after pointing out that there was then no danger of any European State treating any part of the American continent as a fit object for European colonization, remarked that, while Her Majesty's Government

Lord  
Salisbury.  
87 S.P.  
1093-A.

fully concur with the view which President Monroe apparently entertained, *that any disturbance of the existing territorial distribution in that hemisphere by any fresh acquisitions on the part of any European State would be a highly inexpedient change, . . . they are not prepared to admit that the recognition of that expediency is clothed with the sanction which belongs to a doctrine of international law.*

And referring to the Doctrine as a whole his Lordship said :

In the remarks which I have made I have argued on the theory that the Monroe doctrine in itself is sound. I must not, however, be understood as expressing any acceptance of it on the part of Her Majesty's Government. It must always be mentioned with respect, on account of the distinguished statesman to whom it is due, and the great nation who have generally adopted it. But international law is founded on the general consent of nations, and no statesman, however eminent, and no nation, however powerful, are competent to insert into the code of international law a novel principle which was never recognized before, and which has not since been accepted by the Government of any other country.

The Covenant of the League of Nations provides (in Art. 21) that

Covenant  
of the  
League of  
Nations.

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.

Mr.  
Hughes.  
*The Times*,  
Dec. 1,  
1923, pp.  
10 & 11.

Although this Article in terms purports merely to leave the validity of the Doctrine where it was, it does appear to imply some recognition of that validity by the Members of the League. As recently as November 30, 1923, however, the United States Secretary of State in dealing with the Doctrine on the occasion of the centenary of its enunciation appears to have treated it as an expression of United States' policy—'as a statement of the principle of opposition to action by non-American Powers'—rather than as a rule of International Law.

Its force  
political  
rather than  
legal.

See Oppenheim,  
*Am. J. of Int'l.  
Law*, II, 364; &  
Rear-Admiral  
Mahalan in the  
*N. Am. Review*,  
Jan. 1912.

It would appear, therefore, that if the point should ever arise before an International Court, the right of European Powers to occupy land which is properly *territorium nullius* would be upheld if that land should happen to be situated in America no less than if it were in some other part of the world. As an expression of the policy of the United States, the Doctrine is of supreme moment, and no European Power would lightly disregard it. But its importance is political and not legal.

Putumayo  
District.  
Cd. 6266  
(1912), p. 9.

As an instance of a case in respect of which the particular part of the Monroe Doctrine that we have considered is of interest, we may mention the Putumayo district in South America, the sovereignty over which is the subject of dispute between Colombia and Peru. In this region, to use the words of the British Consul-General in 1911, 'no civilised jurisdiction existed or Government authority was exercised.' 'The early settlers,' to quote again from the same Consul-General, 'or searchers for Indians, as they should rightly be termed, . . . came as filibusters, not as civilisers, and were unaccompanied by any executive officers representing a civilised control. The region was practically a no-man's land, lying remote from any restraining authority or civilising influence, and figuring on maps of South America as claimed by three separate republics.' 'It was inhabited by Indians 'still dwelling in the forest, a rude and extremely primitive existence,' to whom civilisation had come, 'not in the guise of settled occupation by men of European descent, accompanied by executive control to assert the supremacy of law, but by individuals in search of Indian labour—a thing to be mercilessly used, and driven to the most profitable of tasks—rubber getting—by terror and compulsion,' a process under which the Indians were disappearing rapidly (1912).

See also  
in re the  
Peruvian  
Amazon Co.  
Ltd. 29  
Times Law  
Reports 384.

Now it is obvious that, at the time these reports were made, the territory in question was not under any political administrative control, and in that condition it may be doubted if either

Colombia or Peru would have had a good legal ground of objection against a Power who might have chosen to set up an efficient administration there. If then a European Power had taken possession of the region in these circumstances, any objections which the United States might have wished to raise under the Monroe Doctrine to such a proceeding would have had to be based upon political and not upon legal considerations.

*Her. Ed.*  
8078 (1913),  
p. 15.

## CHAPTER IX.

### CONCLUSIONS.

We may sum up the conclusions at which we have arrived in Part I as follows :

I.—Areas which are *territoria nullius* and open to acquisition by Occupation may consist of :

(1) Uninhabited lands ; unless they are unsuitable for permanent habitation and are being used for the purposes for which they are suitable, or are islands which are situated within territorial waters, or have been formed by alluvium from occupied territory.

(2) Lands inhabited by individuals who are not permanently united for political action.

(3) Lands which have been abandoned by their former occupants.

(4) Lands which have been forfeited because they have not been occupied effectively.

(5) Seas that are almost or entirely surrounded by land which fulfils one of the above conditions.

(6) The belt of the ocean bordering on land which fulfils one of the above conditions to a distance of at least three marine miles from the shore occupied, with possible extensions in the cases of bays and straits.

(7) The soil beneath the bed of the open sea—by starting from beneath territorial waters.

(8) Portions of the open sea adjoining the territorial belt—by accretions to the neighbouring land.

II.—Lands inhabited by any permanent political society can be acquired only by Conquest, Cession or Prescription.

III.—The open sea, though *territorium nullius*, is not now susceptible of sovereignty, save in certain cases where prescriptive rights are claimed to sedentary fisheries on the sea-bed.

IV.—States may, by agreement, bind themselves not to make particular acquisitions. Apart from such agreements, the above conditions apply, from the legal point of view, to territory situated in any part of the world, although, so far as the American continent is concerned, they are dominated by political considerations arising out of the Monroe Doctrine.

## PART II.

# THE ACQUIRING SOVEREIGN.

### CHAPTER X.

#### SCOPE OF PART II.

In the preceding discussion we have been concerned with the object of an acquisition, the territory to be acquired. We will now consider who may acquire territorial sovereignty, i.e. what are the characteristics that distinguish the person or body who can validly assume the sovereignty over an area which is acquirable by Occupation, or obtain a good title to the dominion over the territory of a backward political society by Conquest, Cession or Prescription. We are not here immediately concerned with the question as to what agents may be employed by the would-be sovereign in the process of acquiring the sovereignty, but with the qualifications that must be possessed by the would-be sovereign if a legally valid title is to be obtained.

*See Ch.  
XXVIII.  
below.*

Public  
Inter-  
national  
Law is  
concerned  
only with  
inter-State  
relations ;

Biantochli,  
§ 277.

but some-  
times  
recognizes  
the results  
of private  
activity.

Now Public International Law exists to regulate the relations between States or political communities as such. It is not concerned with individuals as individuals, but only with the political communities into which individuals are grouped. Such rights as it recognizes are rights which belong to the State or community as a whole ; such privileges as individuals derive from it they enjoy as members of their State. It follows then from broad principles that, so far as International Law is concerned, the capacity to acquire beneficially the sovereignty over territory not already under the dominion of a member of the International Family can be possessed only by a State.

But there is another principle to take into account, namely, that there are certain cases in which, although International Law does not prohibit or authorize certain acts, it recognizes the consequences of those acts, once those consequences have been effectively brought about. In accordance with this

principle, if an individual, or a society which is not a State, has in fact acquired the sovereignty over certain territory and is actually exercising that sovereignty, although there may have been no recognition on the part of the members of the International Family such as would mark the entrance of the community in question into the circle of the Family of Nations, International Law may recognize the new order of things for certain purposes, for example, as rendering territory which was previously *territorium nullius* no longer open to Occupation.

Bearing these general principles in mind, we will consider the whole question in more detail, and we shall treat it under four heads, considering in succession with regard to their capacity to acquire and exercise territorial sovereignty (1) Individuals, (2) Chartered Companies or Corporations, (3) Colonies, and parts of a State which may for some purposes form independent units, and (4) States and pluralities or Leagues of States.

## CHAPTER XI.

### INDIVIDUALS.

Private individuals possess no capacity to acquire sovereignty for their own benefit ;  
Twiss, *The Oregon Question*, 151.  
but sovereignty exercised *de facto* may have legal consequences.  
Halmburger, p. 76,  
Vattel, II. § 90.

INTERNATIONAL Law does not recognize in individuals the right to acquire sovereignty for their personal benefit. As Twiss puts it, an independent individual can only acquire the *dominium utile* as distinguished from the *dominium eminens*, 'he cannot arrogate to himself an exclusive right to the country, or to the empire over it.'

If, however, an individual has actually established himself as *de facto* sovereign over an inhabited region, then International Law may, for some purposes, take account of the fact. Thus Vattel says :

An independent individual, whether he has been driven from his country, or has legally quitted it of his own accord, may settle in a country which he finds without an owner, and there possess an independent domain. Whoever would afterwards make himself master of the entire country, could not do it with justice without respecting the rights and independence of this person. But, if he himself finds a sufficient number of men who are willing to live under his laws, he may form a new state within the country he has discovered, and possess there both the domain and the empire. But, if this individual should arrogate to himself alone an exclusive right to a country, there to reign monarch without subjects, his vain pretensions would be justly held in contempt :—a rash and ridiculous possession can produce no real right.

The acquisition of sovereignty (1) by individuals under no allegiance;

If an independent individual who is not a subject of any State, i.e. who is *sans patrie* or *heimatlosen*, should acquire the sovereignty over backward peoples, he would, from the legal point of view, be in the same position as a native chief, and International Law will regard the community which he governs in the same light as if its ruler had been a native. In this sense Vattel says :

II. § 96.

There are also other means by which a private person may found a new state. Thus, in the eleventh century, some Norman noblemen

founded a new empire in Sicily, after having wrested that island by conquest from the common enemies of the Christian name. The custom of the nation permitted the citizens to quit their country in order to seek their fortune elsewhere.

If the private individual is already a subject of a State which is a member of the International Family, the problem is not so simple. In the first place, it will probably be the law of that State that any sovereignty acquired by one of its subjects is acquired for the State. This, for example, is the rule in English law. In such a case, International Law takes notice of the municipal law, and, where sovereignty is being actually exercised by the subject of a State which claims that by its laws that sovereignty of right belongs to the State, it regards the State, and not the individual, as the true sovereign.

As Lord Halsbury has remarked, however, you cannot 'force a Sovereign to take territory,' and if the State refuses to accept international responsibility for territory over which sovereignty has been acquired by one of its subjects, a somewhat difficult state of affairs exists. As a subject, the individual would be entitled to the protection of his State against arbitrary action on the part of foreign Powers, but his State could hardly be expected to protect him if that arbitrary action arose in connection with the *de facto* sovereignty for which the State had declined responsibility. On the other hand, it would not be reasonable for States who might feel aggrieved by the acts of the *de facto* sovereign in that capacity to address their protests to the State of which he was a subject. Suppose, for instance, that a State considered that certain rules enforced by the *de facto* sovereign were not fair to its subjects, it would be necessary for such a State to deal with the *de facto* sovereign directly. If this were all, it might be argued that the conditions are the same as in the previous case we have considered, in which the sovereign is not himself the subject of another State. But situations may occur in which his double capacity would result in serious difficulty due to the fact that his duties in one capacity may be inconsistent with those in the other. For example, he might make a treaty with a foreign Power which, in his capacity as sovereign, he would be bound to carry out, but the execution of which, if war were to break out between that Power and his national State, would be inconsistent with his duty as a subject.

In view of the international difficulties that might arise if the subject of one State possessed the right of territorial sovereignty absolutely, and not merely as agent for his State, it

(2) by subjects of a State.  
Forsyth:  
Cases, etc. 20.

Tarring, p. 3.

Jenkyns,  
pp. 41 & 195.

Westlake, I. X.

Phillimore,  
I. § CCXXVII.

Pufendorf,

IV. VI. V.

Parly. Paper:  
Bornoo (1855-  
XXIX.), p. 19.

R. v. Creine,  
1011), 2 K. B.  
at 623.

Jenkyns, 195.

Reffter, § 70.

See Parly.

Paper:

Bornoo

(1856),

p. 18.

*But see*  
Heimbürger,  
p. 76.

would not appear to be justifiable for the members of the International Family to recognize the *de facto* sovereign so long as he remains a subject of his original State, or, at all events, until such a condition of affairs has been set up that it would not be reasonable for his original State to insist upon his allegiance. Until that condition of affairs has been attained, International Law can take no account of his position, so that if, for example, he is exercising sovereignty by virtue of a treaty which he has made with the natives, such a treaty would be no bar to a subsequent transfer of the sovereignty by the natives to a foreign State.

### *Rajah Brooke in Sarawak.*

Parly. Paper:  
Borneo (1866),  
Tarring,  
Ch. I., p. 23.

An example of the case we have just considered is afforded by the position occupied by Rajah Brooke in Sarawak, at any rate during the latter part of the period between 1842 and 1888. When Sir James Brooke first visited Sarawak, he found a rebellion in progress there against the authority of the Sultan of Borneo, which he succeeded in repressing, and in 1842 the Sultan granted the government of Sarawak to him upon payment of an annual tribute. Eleven years later the Sultan remitted the tribute, and gave Rajah Brooke the right to nominate his successor, each succeeding Rajah, upon his accession, to pay a fine of £1,000 to the Sultan. Rajah Brooke's repeated requests to the British Government to place Sarawak under British protection met with no success until 1888, and his exact position in Sarawak during the intervening period is by no means clear.

Parly.  
Paper:  
Borneo  
(1866),  
p. 68.

ib. 16 &  
232.

ib. 76.

In 1865 the British Government sent out two Commissioners to inquire *inter alia* 'whether the position of Sir James Brooke at Sarawak, either as holding that possession of the Sultan of Borneo, or, as he now alleges, as an independent Rajah, holding it by the free choice of the people, be compatible . . . with his character of a British subject.' The Commissioners were instructed 'that by no act of Her Majesty's Government has countenance ever been given to Sir James Brooke's assumption of independence, and that his possession of Sarawak has never been considered otherwise by them than as a private grant bestowed by a foreign Sovereign upon a British subject.'

Sir James protested against this statement as being opposed to facts. He maintained that, although the Sarawak Government was *de jure* dependent, since there was the deed with the

payment of £1,000 on demise, *de facto* it was absolutely independent, since it had all the ordinary powers of a Government, such as the power to conclude treaties and make war. He alleged, moreover, that the tenure included no acts of service whatever, and that the Government of Borneo was a mere shadow, and he likened the relationship between the Sultan of Borneo and himself to that of a feudal lord and feudatory. He had, with the approval of the British Government, entered into direct negotiations with the United States; he did not regard himself as bound by the treaties made by the Sultan with other Powers; and he considered that he was entitled to transfer the country into the position of a dependency on some other nation. It is clear that he intended to remain a British subject, for he declared to the Commissioners that, if a difficulty should arise which would make his position at Sarawak incompatible with his obedience as a British subject, that position would be relinquished.

Ib. 11 & 230.

Ib. 231-3.

Ib. 19.

In his report, one of the Commissioners stated that he did not find that the position of Sir James Brooke was any more inconsistent with his character of a British subject 'than the ordinary and frequent case of British subjects engaging in the service of a foreign Power, from which they may legally be recalled by their native Sovereign on pain of outlawry.' Sir James was, in his opinion, in the position of a vassal of the Sultan, although he held by a tenure which, though it was lax and easy to be thrown off altogether, could not be disregarded by Great Britain in her existing relations with the Sultan.

Ib. 5 & 6.

The other Commissioner appears to have inclined to the view that Sarawak was not entirely independent of the Sultan of Borneo. He stated that, while in the management of Sarawak Sir James appeared to be altogether independent of, and free from, all interference on the part of the Sultan, there was no doubt that Sarawak was formerly a possession of the Sultan, and as there had never been a declaration of independence or other public notification of the position, foreign States, in acknowledging its independence, would possibly be in danger of committing an uncalled-for act of aggression against the Sultan. He came to the conclusion that the title of Sir James Brooke was based upon the Sultan's grant, but as the Commissioners had not been able to ascertain the terms of the document on which the grant was made, he could not say whether, under that grant, Sir James held Sarawak as part of the Sultan's dominions or as an independent State. In the

Ib. 16 sq.

former case, he pointed out, the chief difficulties of the position vanished, especially those that might arise in connection with the Rajah's relations towards foreign States. On the other hand, if independence were admitted to be complete and absolute, it was possible that the duties which attach to a British subject must regulate his position as ruler. In the face of the Act of 1813, 53 Geo. III. c. 155, declaring 'the undoubted sovereignty of the Crown over the territorial acquisitions of the East India Company,' he was not inclined to uphold the opinion that Sir James Brooke, or any other British subject, could attain to the position of being an independent ruler of a foreign territory.

ib. 19.

In 1864 a British Consul was appointed to Sarawak. Four years later Sir James was succeeded as Rajah by his nephew, Sir Charles Brooke.

79 S.P. 238

In 1888, in an Agreement made between the British Government and Rajah Brooke for the establishment of a British Protectorate over Sarawak, Sir Charles was described as 'Rajah and lawful Ruler of the State of Sarawak,' and it was agreed that 'The State of Sarawak shall continue to be governed and administered by the said Rajah Brooke and his successors as an independent State under the protection of Great Britain; but such protection shall confer no right on Her Majesty's Government to interfere with the internal administration of that State further than is herein provided.' The relations between the State of Sarawak and all foreign States, including the States of Brunei and North Borneo, were to be conducted by Her Majesty's Government or in accordance with its decisions; and Her Majesty's Government had the right to establish British consular officers in any part of the State of Sarawak, those officers to receive exequaturs in the name of the Government of Sarawak.

It would thus appear that in 1855, so far as foreign Powers were concerned, Sarawak formed part of the dominions of the Sultan of Borneo; and that at some time between that date and 1888 it became independent. From the time that the sovereignty of the Sultan disappeared until the country was taken under the protection of Great Britain the position of the Rajah was a precarious one, for he was in the position of a British subject exercising independent sovereignty, a position which, as we have seen, International Law cannot recognize.

*Acquisition of Sovereignty by Aggregates of Individuals not forming a Corporation.*

In the same way, although International Law does not recognize any rights in a mere aggregate of individuals as such, any more than in a single individual, if a number of persons establish themselves in a certain territory and set up an efficient and stable government there, they may thereby found a political society of which International Law will take account for some purposes, at all events to the extent of declaring that the territory is no longer *territorium nullius*. 'L'Occupation,' writes Wolff, 'se fait, ou par plusieurs personnes ensemble, *per universitatem*, qui s'ompurent en commun d'une chose, par exemple, d'un Païs ; ou par les particuliers. . . . Ce qui est occupé par la première de ces deux voyes, demeure appartenant à toute la Communauté.'

II. II.  
xxxviii

This state of affairs may be brought about by a party of settlers going out to a new country and forming a political society there, for instance, after the manner adopted by the Pilgrim Fathers during the first few years after their arrival in America. Driven from England by religious persecution, and compelled against their intention to land on the shores of Cape Cod in New England, they drew up and signed, before landing from the *Mayflower*, a voluntary pact of government, by which they formed themselves into a civil body politic, and under the authority of which they organized their government from the time of their landing in November 1620 until January 1629, when they received a patent from the Plymouth Company whose grant from the Crown covered the district in which they had settled.

The  
Pilgrim  
Fathers.  
Story :  
Comment.  
aries, §§ 54-6.  
(amb. Mod.  
Hist.  
VII. Ch. J.

Or a political society may be formed by the union, for the purposes of government, of a number of individuals already living in a country without a sovereign. Thus Vattel says that, I. § 203.

If a number of free families, scattered over an independent country, come to unite for the purpose of forming a nation or state, they altogether acquire the sovereignty over the whole country they inhabit : for, they were previously in possession of the domain—a proportional share of it belonging to each individual family : and since they are willing to form together a political society, and establish a public authority, which every member of the society shall be bound to obey, it is evidently their intention to attribute to that public authority the right of command over the whole country.

By Individuals  
mostly subjects  
of one State.  
Westlake, I. X.  
Phillimore,  
L. § CCXXVII.  
Johnson v.  
M'Intosh,  
8 Wheat.  
Reps. at 595.  
Cana. S. Africa,  
Ch. II.

If all or nearly all of the settlers are subjects of the same State, and that State claims the sovereignty over the territory in virtue of the settlement, its claim would be recognized by International Law. Thus, after the Great Trek of the Dutch farmers from Cape Colony in 1836 and the following years, Great Britain asserted her sovereignty over the territories which the trekkers had conquered from the Zulus and the Matabele, in virtue of the fact that they were British subjects, Cape Colony having been ceded to Great Britain in 1814.

Westlake, I. X.

But if, although all or a large majority of the settlers were subjects of the same State, that State definitely refuses to accept, or after a reasonable time has not assumed, international responsibility for the settlement, then, when the settlers have developed an efficient government of their own, a new State will have been born. By regarding the settlers as nationals of this new State, we avoid the difficulties which we have noticed in the case where the subject of one State possesses independently in himself the rights of territorial sovereignty, and the way is clear for its international recognition. Whether or no the settlers will remain nationals of their original State will depend upon the municipal law of that State.

Individuals  
belonging  
to no  
State,  
Johnson v.  
M'Intosh, 8  
Wheat.  
Reps. at  
595.

If the settlers were not subjects of an existing State, *a fortiori* they will have set up a new one. To quote Chief Justice Marshall: 'It is supposed to be a principle of universal law, that, if an uninhabited country be discovered by a number of individuals, who acknowledge no connexion with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parcelled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.'

Individuals  
belonging  
to several  
States.

Westlake, I. X.

Hall:  
Foreign  
Powers, etc.  
§ 31 sq.

In the case where the settlers originally belonged to different States, so that no existing State can claim the sovereignty over the settlement upon the ground that it was set up by its subjects, the same considerations will apply. A new State will have been formed when an efficient government has been established, and such of the settlers as have not lost their original nationality will be in the position of persons possessing double nationality.

## CHAPTER XII.

### CORPORATIONS.

IN this Chapter we shall deal with cases in which individuals are combined together in such a way as to form an artificial person in which, for its purposes, the personalities of its members are merged. In almost every case that we shall have to consider, the Corporation is the creation of a State, which has bestowed upon it privileges in respect of commerce, or the settlement or industrial exploitation of land, within certain areas, these privileges being frequently coupled with powers and duties of government. Formed in most cases, at all events from the point of view of the shareholders, for the purpose of earning dividends, these corporations have proved to be the instruments by which enormous areas have been brought under the dominion of the States under whose auspices they were created, and in this way they have been utilized by all the important colonizing Powers. The special field of their operations has been territory which the State creating them was not at the time prepared to administer directly, but which offered good prospects from the point of view of trade or industrial exploitation.

*Polignone's  
Dirig. Art.  
Colonies ;  
Gouv. of, by  
Companies.*

When a State has called such a body into being for express purposes, it should, it would seem, be prepared to accept international responsibility for the way in which those purposes are carried out, so long as the Corporation is working under its charter. And this is the view usually adopted. But such a proposition has not always received universal assent. Taylor, for example, considers that such bodies are, to a certain extent, subjects of International Law because they are the legislative and administrative bodies over large areas with only a nominal supervision from the parent State, and are permitted, to a limited extent, to have certain 'dealings' with foreign States.

We will consider the history of these Corporations in some detail, especially from the point of view of ascertaining how far

**Rights and  
duties of  
a State  
creating a  
Corporation.**

*See e.g.  
Lawrence, § 42.  
Bonfil, § 563.  
Dospagnet,  
§ 395.  
Taylor, § 222.*

**The  
exercise of  
sovereign**

powers by  
Corpora-  
tions.

The history  
of  
Chartered  
Companies  
falls into  
two  
periods.

they can be said to have exercised sovereign powers, and particularly the powers of external sovereignty.

Chartered Companies have made their appearance at two epochs in the history of colonization, at times when the extension of geographical knowledge has largely increased the known area of territory eligible for appropriation, namely, at the time of the discoveries of the fifteenth and sixteenth centuries, and again following the explorations of the last century.

#### The Earlier Companies.

Reinsch,  
Ch. IX.

Girault,  
I. § 38.

*Les  
Compagnies  
de Colon-  
isation*, p. 21.

In the earlier period, English, Dutch, Portuguese, French, Prussian, Danish and Swedish Companies were granted charters by their respective Governments, the French Government being particularly active in this respect—Chailley-Bert gives a list of seventy-five French Colonization Companies which were formed between 1599 and 1789. The chief object of the charters was to secure to the grantees a monopoly of trade within specified areas, although the commercial privileges were usually coupled with grants of territory and political powers. From the large number of Companies which were formed during this period, we will select one or two of the most important, and notice the principal provisions of their charters and the salient facts of their history from our present point of view.

Patent of  
Henry VII.  
Payne, I.  
216.

Among the earliest Companies was one of six members to whom Henry VII granted a patent in 1501 authorizing them to sail East, West, North and South and discover lands of Gentiles and Infidels and take possession of them as the King's vassals. The grantees were empowered to make laws for good and quiet government; the lands of which they took possession were to be held by fealty only; and they were granted a monopoly of trade with the lands discovered for ten years, with certain exemptions from customs duties in England.

It was not, however, until a century later that the great Companies were formed that have played such an important part in the history of colonization.

#### The Virginia Colonization Companies.

First  
Charter of  
Virginia.

As examples of charters the main purpose of which was to promote colonization, we will take those under which the first permanent English settlements were made in America. By the first Charter of Virginia of 1606, King James established two joint-stock Companies, the Southern or London Company to

settle along the coast between 34° and 41° N. latitude, and the Northern or Plymouth Company to settle between 38° and 45°, but not within one hundred miles of each other. Each of the Companies was to have all the land around the first seat of its plantation for fifty miles in both directions along the sea-coast by a hundred miles inland, with all the islands within a hundred miles of the coast. They were empowered to fortify their territories, to coin money, and to expel all persons attempting to settle in the territories without their leave. They might impose certain small customs duties; and they were given temporary privileges in respect of free exportation from England. All persons, being English subjects and inhabiting the colonies, were to have the same liberties, franchises and immunities as if they had lived in England. Provision was made for outlawing any member of the colony who should commit robbery or spoil to any fellow subject or to the subject of any friendly State and not give satisfaction. All the lands were to be held of the King under the assumption that they formed part of an English manor, and the Company was authorized to grant them to the inhabitants of the colony. One-fifth of all the gold and silver and one-fifteenth of all the copper mined was to go to the King. The government of the colony was to be exercised by a local Council, the members of which were to be appointed and removed in accordance with Instructions under the royal Sign Manual. This Council was to be subordinate to another Council in England.

*Hazard,*  
p. 50.  
Story:  
Comment-  
aries, §§ 41-49.

By new charters of 1609 and 1612 the territories of the London Company were declared to extend across the continent with a width of four hundred miles north and south; and in 1620 the Plymouth Company received a new grant, under which its territories were to extend from 40° to 48° throughout the mainland from sea to sea, and were to be named New England.

*New  
Charters  
to the  
London  
Company  
and the  
Plymouth  
Company.*  
*Hazard, 58  
and 103.  
Story,  
§§ 61-62.  
Dissolu-  
tion of the  
Companies.*  
*Story, §§ 46  
and 70-71.*

The Southern Company's charter was declared to be forfeited in 1624, and the Colony of Virginia—a name which had become restricted to the territories of this Company—was placed under the direct control of the Crown. The Northern or New England Company surrendered its charter to the Crown in 1635, but not before it had made, under the powers given it by the charter, grants of the territories afterwards known as Massachusetts (1628), Maine (1622), New Hampshire (1629), New Plymouth (1629), and Connecticut (1630 and 1635), the first two grants being confirmed by charters from the Crown.

*The British East India Company.*

The most important of the purely trading Companies were the English and Dutch Companies of merchants trading to the East Indies. In the case of the English Company, what was at first a mere trading Corporation came in the course of time to exercise sovereign rights over an immense area which afterwards passed under the direct administration of the British Crown. We will briefly notice the more important of the steps by which this change was brought about.

Hibert, Ch. I.  
Hibert, 1st  
Ed. 474 sq.

The charter granted by Queen Elizabeth in 1600 to the Governor and Company of Merchants of London trading into the East Indies gave them the sole right to 'traffick and use the Trade of Merchandise, by Seas,' into and from the East Indies, and any other persons who carried on trade with those parts without the licence of the Company were subject to severe penalties. In 1661 the Company was empowered to send ships of war, men or ammunition for the defence of its factories and places of trade, to erect fortresses, and to give its commanders power to make peace or war with the natives. In 1677 it was given the power to coin money; and in 1688 further powers of making peace and war with any of the heathen nations, being natives of the parts of Asia and America mentioned in the charter, and of raising military forces, but reserving to the Crown 'the sovereign right, powers and dominion over all the forts and places of habitation' and 'power of making peace and war when we shall be pleased to interpose our royal authority thereon.'

The way was thus prepared for the exercise of sovereign powers by the Company, and although it was engaged in serious and almost continuous wars, at first with the Portuguese, later with the Dutch East India Company which had been formed in 1602, and later still with the French East India Company formed in 1664, it remained a trading Company with only a few establishments on the coast, until after the Conquest of Bengal in 1757. When, in 1765, the Company assumed, under a nominal grant from the Moghul Emperor, direct administration of the revenue of the provinces of Bengal, Behar and Orissa, it had taken its place as a *de facto* territorial sovereign and embarked upon that series of conquests, annexations, and subsidiary treaties which resulted, in a hundred years, in the extension of its dominion in one form or another over the whole of India.

But no sooner had it entered upon this course than the British Government began to insist that the British Crown was the real sovereign of the territories acquired. As the High Court at Bombay said in the case of *Damodhar Gordhan v. Deoram Kanji* (1878), 'All the charters from 1767 expressly entrust the Company with possession and government of the British territories, and appropriation of the revenues (as a necessary means of governing) for the Crown.' It was in relation to India that the House of Commons in 1778 passed resolutions declaring that all acquisitions made by military force, or by treaty with foreign Powers, do of right belong to the State.

1 A. C. 21  
343.

Ilbert, 51.

In 1784 the Board of Control was established to supervise the directors of the Company on behalf of the British Government. In 1813 the Company's monopoly of trade was partly taken away, but it was left in possession of its territory in India 'without prejudice to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the same.' Twenty years later the Company was called upon to discontinue its trading operations altogether. In 1858 it was dissolved, and, by the Government of India Act of that year, 'The Government of the Territories . . . and all Powers in relation to Government vested in or exercised by the said Company in trust for Her Majesty,' were taken over for direct exercise by the Crown.

21 & 22  
Vict. c. 106,  
s. 1.

### *The Hudson's Bay Company.*

What the East India Company did for the extension of the British Empire in the Old World had its counterpart in the achievements of the Hudson's Bay Company in the New, but the monopoly of trade granted to this Company was coupled with the grant of territory and powers of government from the first. The charter of May 22, 1670, granted by Charles II to 'The Governor and Company of Adventurers of England trading into Hudson Bay' secured to them exclusive trading rights over a vast area in North America, 'together with all the Lands, Countries and Territories upon the Coasts and Confines of the Seas, Straights, Bays, Lakes, Rivers, Creeks, and Sounds' within the entrance of Hudson's Bay, which were not possessed by the subjects of any Christian Prince or State. The Company was given legislative and judicial powers over all the inhabitants of the lands ceded to it. It might build fortifications, maintain military and naval forces, and make peace or war with any

*The Hud-  
son's Bay  
Co. Ltd. v.  
Stevens*,  
V, Tax  
Cases, 424.  
Bryce, G.:  
*Hudson's  
Bay Co.*,  
Ch. II.  
Lank, A. C.:  
*Grant  
Northwest*,  
Ch. VII.

non-Christian Prince or people. Although the political powers granted to the Company were so complete, the ultimate sovereignty of the British Crown was fully recognized. The land was to be held of the King 'as of our Manor of East Greenwich, in our County of Kent, in free and common Socage' and the Charter saves 'the Faith, Allegiance, and Sovereign Dominion due to Us, our Heirs and Successors.'

Laut, *op.*  
cit. II. 404.

The question of withdrawing the Company's charter was discussed in the British Parliament in 1749; but it retained its privileges and continued to extend the area of its operations. At a parliamentary inquiry held in 1857 it was shown that, in addition to the territory of the Bay proper which it governed under its original charter, the Company ruled over Vancouver Island and the Indian territory between that Island and the Bay under separate grants. In 1859 the Company lost its trading monopoly. Ten years later it surrendered its territories and rights of government to the British Crown, receiving a money payment from the Dominion of Canada together with large grants of land. It still continues its trading operations.

#### *The French Companies.*

Girault, I.  
§ 38.  
Chailley-  
Berth, Ch. I.

The French Companies were of the same general kind. When the main purpose of the Company was colonization, it was granted rights of sovereignty and property in the land, so that it could transfer or cultivate or otherwise exploit the soil. When the chief object was commerce, a monopoly of trade was generally coupled with special privileges with respect to importations into or exportations from France. Usually both sets of privileges found a place in the same charter. Upon the Company was cast the duty of defending and administering the colony.

Petit, I. 1. *sq.*  
Girault, I.  
§ 38.  
Chailley-  
Berth, Ch. I.  
§ 38.  
*Camb. Mod.*  
*Hist.*, VII.  
Ch. III.  
French  
West India  
Companies.

Among the most important of the French charters were those bestowed upon the East and West India Companies. The charter of 1626 to the *Compagnie des Isles de l'Amérique* deals with St. Christopher and other islands in the West Indies. It recites that the grantees have discovered and occupied some of these islands, and gives them, for twenty years, the monopoly of colonization, cultivation of the land, working of the mines, and trade with France. The islands are to be held under the authority of the King, who is to have one-tenth of certain of the profits. In 1685 the King gave to the Company 'la propriété de leurs découvertes, en toute justice & seigneurie, ne réservant à sa majesté, & à ses successeurs, que le ressort, la foi &

hommage à chaque mutation de roi.' The King reserved to himself the right to appoint the Governor-general and the chief magistrates, and gave special privileges to the colonists. The Company, on its part, undertook to instruct the natives in the Catholic religion, to transport four thousand French Catholics to the islands in twenty years, and to found colonies in the other islands not occupied by Christian Princes. Only French Catholics were to be allowed to enter the islands. The descendants of Frenchmen inhabiting the islands, and the savages who professed Christianity, were to be deemed '*naturels Français*.' Failure on the part of the Company to carry out its obligations was to entail the loss of its monopoly of trade and of all the lands which it had not occupied.

The King was so satisfied with the way in which the Company had carried out its duties that, in 1642, he added to its privileges, and promised to assist it with vessels and soldiers if it should undertake expeditions against islands occupied by the enemy. A few years later, the Company sold the greater number of the islands which it possessed, but the sovereignty remained in the King, who nominated the new proprietors as his Governors-general in the various islands.

Petit, I. 18.

The Company gave place in 1664 to the *Compagnie des Indes occidentales*. This Company was granted very wide privileges. The islands which had been sold were bought back and included in its grant. It was to have the entire lordship over its lands, saving only homage to the Kings of France. A monopoly of commerce and navigation with the continent of America and the West Coast of Africa was given to it for forty years. It might fortify, make alliances and war, and hold such lands as it should conquer. It was to receive a bounty upon all goods exported from or imported into France; and the Government made it a large advance of capital, free of interest for four years. French colonists were to enjoy the same liberties and franchises as if they had remained in France, and their children, as well as converted savages, were to be regarded as Frenchmen. The Company, however, was not a success financially, and it did little in the way of colonization. In 1673 it sold its African rights, and the following year it was wound up; the Crown assumed the direct administration of its American territories, and the commerce was thrown open to all Frenchmen.

The charter granted to the *Compagnie des Indes orientales* in 1664 gave it a monopoly of commerce from the Cape of Good Hope to the China Seas for fifty years, and in the matter of

French  
East India  
Companies.

Orsault, I. § 89.  
 Chalvey-  
 Bert, III. § 1.  
 Lyall :  
 India, Chs.  
 IV.-VI.  
 Camb. Mod.  
 Hist. VII.  
 Ch. III.

bounties and the advance of capital without interest it was treated even more liberally than its sister Company. In 1719 it was combined with several other Companies (one of which had for its object the colonization of Louisiana), forming the great *Compagnie des Indes* with a monopoly of trade in both hemispheres. It soon, however, gave up its rights over Louisiana to the Crown and confined its activities to the East India trade, occupying the island of Mauritius and forming trading settlements on the south-east coast of India. Its attempts to acquire political ascendancy in India, however, involved it in bitter and costly wars with the English Company, which seriously crippled its resources in spite of liberal assistance from the French Government, and, following the fall of Pondicherry in 1761, the Company was dissolved in 1770.

### *The Dutch Companies.*

The Dutch Companies, too, when they were acquiring sovereign powers, were acting on behalf of the States-General. Thus, in the charter granted in 1621 by Their High Mightinesses the Lords the States-General to the West India Company—by which, and its successors, Dutch influence was exercised and extended in Guiana—it was provided :

G. 8106  
 (1800),  
 p. 64.

That henceforth the aforesaid Company shall be permitted to make in our name and authority, within the limits set forth above, contracts, leagues, and alliances with the Princes and natives of the lands therein comprised; they may also build there some fortresses and strongholds, appoint Governors, soldiers and officers of justice . . . and the representatives of the Company shall successively communicate to us and hand over such contracts and alliances as they shall have made with the aforesaid Princes and nations, together with the situation of the fortresses, strongholds, and settlements taken in hand by them.

The Governor-general and other officers were to take the oath of loyalty to the States-General as well as to the Company.

### *The Companies were Dependent Sovereigns.*

These examples will serve to show to what a large extent the Companies of the earlier period were given and exercised sovereign powers. But although they were left very much to themselves by their respective States, those States were always in the background.

The British East India Company was certainly a sovereign Power so far as the native States of India were concerned,

keeping up its own army and navy, making war, not only with native States, but with the Portuguese, Dutch, and French—on occasions when the respective Governments in Europe were at peace—and, later on, administering vast territories in India, relying for all these purposes on its own wealth and resources. The Company was, however, always working under the powers given it by the Crown, and, so soon as it had begun to acquire territorial sovereignty, the English Government stepped in, claimed that all such sovereignty was acquired for its benefit, and gradually increased its control over the Company until it superseded it entirely. In North America the lands were held of the King as of a feudal lord, and settlements formed under the charters were always considered to be dependent and 'subject to the realm of England.' In all cases the ultimate sovereignty rested with the Crown, and the Crown or Parliament possessed the power to withdraw the charter and assume directly the government of the Companies' territory.

The French and Dutch Governments were more closely connected with their Companies than was the English Government with the English Companies. In the Dutch charters, the Company was regarded as the agent of the Government. The sovereignty of the French King over the territories of the French Companies was reserved, and the settlers remained French citizens. The King took an active interest in the promotion of the Companies with the special object of extending French sovereignty; the duty of colonization was imposed upon unwilling shareholders; and the French Government contributed a good deal of the capital.

So far as the Companies of the first period were concerned, we may say, then, that the enterprise always had its national aspect. Any territory acquired by the Company was considered to accrue to its State. There does not appear to have been any case in which a Company claimed to be an independent sovereign body, and when it was exercising or acquiring sovereign rights it was acting as the delegate or agent of its State.

### The Later Companies.

By the beginning of the nineteenth century, most of the old chartered Companies had disappeared; 1858 saw the end of the British East India Company, and the Hudson's Bay Company surrendered its powers of government in 1869. But scarcely had the last of these old Companies lost its political

Lyall, Ch. I.

Jonkyns,  
p. 41 (note).  
Wilson:  
*Hist. of  
Brit. India*,  
L 610 sq.

Story:  
*Commentaries*, §§ 186  
& 181.

Palgrave's  
*Dicty. Art.*—  
*Colonies*;  
Govt. of, by  
Companies.  
Canning, in  
the House  
of Commons,  
May 31, 1813,  
*Hansard*,  
483-4.

Despagnet,  
§ 305.

Girault,  
§§ 41-2.

Despagnet,  
§ 305.

Bonfil,  
§ 569.

powers when the process of creation was commenced afresh. The zeal for colonial expansion showed itself again in the principal countries of Europe, and the Chartered Company was once more utilized as an instrument for its practical application.

Reinsch,  
Ch. IX.

In their broad features the new Companies resembled the old; they were formed and carried on by private individuals with the view of finding employment for private capital outside Europe, and they prepared the way in an unostentatious manner for the acquisition by their States of vast tracts in Africa and the Far East. They differed from the earlier Companies in that they were given no trade monopolies—their object was the industrial exploitation of the districts over which their powers extended—and their charters imposed numerous duties in the interest of good government and for the benefit of the natives.

#### *The British North Borneo Company.*

73 S.P. 859  
at 1080 sq.  
16 Heriot, 85.  
Colonial  
Office List,  
1925, p. 482.

The first Company of the second series to receive a charter was the British North Borneo Company. This charter is dated November 1, 1881, and is still in force. It recites a petition stating that Alfred Dent and another had obtained from the Sultans of Brunei and Sulu grants of territories, lands and islands in North Borneo, for so long as the grantees or their successors should keep up certain annual payments to the Sultans; and that, in addition, each of the Sultans had by commission appointed one of the grantees supreme ruler of the territories in question, with certain powers which were enumerated.

The powers which the Sultans had thus conferred upon the grantees were very wide. They included in each case that 'of life and death over the inhabitants, with all the absolute rights of property vested in the Sultan over the soil of the country, and the right to dispose of the same, as well as the rights over the productions of the country, whether mineral, vegetable or animal, with the rights of making laws, coining money, creating an army and navy, levying Customs rates on home and foreign trade and shipping, and other dues and taxes on the inhabitants as to him might seem good or expedient, together with all other powers and rights usually exercised by and belonging to sovereign Rulers, and which the Sultan thereby delegated to him of his own free will.' The Sultans further called upon all foreign nations with whom they had formed friendly treaties to acknowledge the new ruler and respect his authority within the ceded territories.

After these recitals, the charter goes on to incorporate the Company, and empowers it to acquire the full benefit of the several grants and commissions aforesaid. It stipulates that the Company shall remain British in character and domicile; that all its directors shall be British subjects; and that the appointment of its principal representative in Borneo shall be subject to the approval of the Secretary of State. The Company is not to transfer the benefit of the grants and commissions without the consent of the Secretary of State; it is to submit any differences between itself and the Sultans to the decision of the Secretary of State; and that Minister may dissent from or object to any dealings of the Company with a foreign Power.

The charter further provides that, as far as may be practicable, slavery is to be abolished within the Company's territories; that the religion of the inhabitants is not to be interfered with; that local customs are to be considered in the administration of justice; and that, in all such matters connected with the inhabitants, any suggestions or objections made by the Secretary of State are to be acted upon by the Company. Provisions are made with regard to the exercise of extra-territorial jurisdiction by the Crown in the territories. The Company may acquire other territories in the region, and it may develop, settle or grant any land. It may trade, but it is to have no monopoly of trade; and, subject to customs duties for revenue purposes and certain restrictions on importation, trade with the Company's territories is to be free. Power is reserved to revoke the charter if the Company should fail to comply with any of its material conditions.

#### *The British African Companies.*

The provisions of this charter were closely followed in the charters subsequently granted to the National African Company (afterwards the Royal Niger Company) in 1886, the Imperial British East Africa Company in 1888, and the British South Africa Company in 1889. In many instances these charters contained identical stipulations. Where the three later charters differed from that of the British North Borneo Company, it was chiefly in the direction of increasing the control of the British Government. The Companies were to be subject to, and were to perform all the obligations contained in, any treaty made between the British Government and any other State or Power whether already made or thereafter to be made; and any

Royal  
Niger  
Company.  
British  
East Africa  
Company.  
British  
South  
Africa  
Company.  
17 Hortalest, 118.  
18 Hortalest,  
82 & 134.

future acquisitions were to be subject to the approval of the Secretary of State.

In the East and South African charters it was provided that the prohibition against monopolies should not prevent the establishment of, or the grant of concessions for, banks, railways, and similar undertakings, or the establishment of a system of patents or copyright. The Niger Company was to furnish to the Secretary of State from time to time accounts and particulars with regard to the duties it imposed, and to give effect to any directions he might make. The British South Africa Company was to furnish, not only accounts of its expenditure for administrative purposes and of its receipts by way of public revenue, but also a report upon its public proceedings and the conditions of its territories, and an estimate of its public expenditure and receipts during the ensuing year. The Judicial Committee of the Privy Council found that the Company was entitled to look to the Crown to reimburse its [net] outlay on public administration.

*In re  
Southern  
Rhodesia,  
1919 A. C.  
at 248.*

In other respects the connection of the British South Africa Company with the British Government was closer than in the other cases. In fact, in granting the charter, the Colonial Secretary was influenced by the consideration that, 'if such a Company is incorporated by Royal charter, its constitution, objects, and operations will become more directly subject to control by Her Majesty's Government than if it were left to these gentlemen to incorporate themselves under the Joint Stock Companies Acts.'

*Ib. at 217.*

The charter provided that the Company should preserve peace and order to the best of its ability, for which purpose it might make ordinances, which were to be approved by the Secretary of State. The officers of the Company were to communicate freely with, and pay due regard to the requirements of, the High Commissioner in South Africa and any other Imperial officers stationed within the territories. The Crown reserved the right, at the end of twenty-five years, and of every succeeding ten years, to amend the charter in so far as it related to administration and public matters, and to take over, on payment of compensation, any building or works belonging to the Company and used for public purposes—and thus, as the Judicial Committee of the Privy Council stated in their Report in the case of the Southern Rhodesian lands, to put an end to this Company's administrative capacity. There was an express provision that nothing in the charter should restrict the powers

*1919 A. C.  
at 247.*

of the Crown with reference to the protection or government of any territories should it see fit to include them within the British dominions.

The charters to these three African Companies have all now been surrendered—the East Africa Company's in 1895, the Niger Company's in 1900, and the South Africa Company's in 1928—and the territories previously controlled by the Companies have passed under direct Government administration.

F.O. Hand-  
books Nos.  
96 & 89.  
*The Times*,  
Oct. 1, 1923.

*German and Portuguese Companies.*

The letters of protection granted by the German Emperor to the German East Africa Company and the New Guinea Company in 1885, and the charters granted by the Portuguese Government to the Mozambique Company in 1891 and 1897, are indicative of closer Government control than appears in the contemporaneous British charters.

77 S.P. 10.  
Maitens,  
2nd Series,  
XI. p. 408.

The letter of protection or *Schutzbrief* granted by the German Emperor to the German New Guinea Company on May 17, 1885, in respect of its acquisitions in the Western Pacific, recited that the Company had 'through an expedition fitted out by itself, acquired and taken into occupation, under control of our Commission on the spot, harbours and portions of the coast with a view to cultivation, and to the establishment of commercial stations, and that these districts were thereupon placed under our protection by our ships of war'; and also that the Company had asked for an Imperial letter of protection delegating to it 'the right to exercise territorial sovereignty under our sovereignty—das Recht zur Ausübung landeshoheitlicher Befugnisse unter Unserer Oberhoheit.'

German  
New  
Guinea  
Company.  
76 S.P. 312.  
Maitens,  
2nd Series,  
XI. p. 476.

The charter affirmed the assumption of Imperial sovereignty over the districts in question. In return for the engagement of the Company to create and maintain a political organization and to defray the costs of an adequate administration of justice, it granted to the Company 'the rights implied in territorial sovereignty, as well as the exclusive right to take into occupation unoccupied land in the protected territory and to dispose of it, and to conclude contracts with the natives as to territorial titles.' All this was stated to be 'under the supervision of our Government, which will take the necessary steps to guarantee such rights of possession to which a former lawful title can be shown, and to protect the natives.' The regulation of the administration of justice, and the direction and conduct of relations with foreign Governments, remained in the disposition

F.O. Hand-  
book, No.  
148, pp. 28  
& 80.  
92 S.P. 381.

Portuguese  
Mozam-  
bique  
Company.  
83 S.P. 391.

80 S.P.  
1024.

of the German Government; and the Company was to observe any directions given by the Government. The directors of the Company were to be members of the German Empire. This charter was revoked, and the German Government assumed authority over the Protectorate in 1899, the Company continuing as a trading corporation only.

The Portuguese charter of 1891 to the Mozambique Company was similar in many of its provisions to the charter of the British South Africa Company. It dealt with territory which had for a long time been claimed by the Portuguese Government. The control of the Government over the Company, and the sovereignty of Portugal over the territory, were adequately provided for. The Government might take action 'for the defence of the territories belonging to the nation'; and in the event of hostilities might take charge of the forces of the Company. The judicial officers were appointed by the Crown. The Government received a proportion of the Company's profits. In 1897 the charter was remodelled, the royal decree stating that 'by the provisions of the present Decree, the sovereign rights of the nation are in no way lessened, but rather confirmed.'

### *The Territorial Sovereignty.*

Sovereignty  
of the  
German  
and Portu-  
guese  
Crowns.

When we examine these charters in order to ascertain who was the international sovereign over the territories to which each related, the first thing that strikes us is that, while the sovereignty of the German and Portuguese Governments clearly appeared upon the face of their charters, the relation of the British Crown to the British Companies was not so plain; and it is necessary to look closely into the provisions of the charters, and the facts of the various cases, in order to ascertain whether the sovereignty of the British Crown must be inferred.

Sovereignty  
of the  
British  
Crown.

In the first place, we note that the British Government did not itself undertake the administration of the districts in question. It was the Companies which, according to the charters, were to hold and exercise the powers of government; it was by the Companies that justice was to be administered to the inhabitants of the territories; and the Companies maintained their own armies and police forces. It is true that, in all important political matters, the acts of the Companies were subject to the approval of the Secretary of State, and the Companies were to observe certain conditions that were contained in their charters. But the Secretary of State took no active part in the government, and, in regard to internal administra-

tion, the Companies were allowed a very free hand. Again, all the charters provided for the possible exercise of the extra-territorial jurisdiction of the British Crown within the Companies' territories—a jurisdiction which is exercised in British protectorates and foreign countries but not within British territory.

The territories of the Companies were thus clearly not an integral part of the British dominions. Should they be regarded as having been under British protection?

In the first place, we will examine this question in the light of the facts surrounding the various grants, apart from the actual provisions of the charters.

The territories in respect of which the grant was made to the Royal Niger Company had already been placed under British protection.

The field of action of the East Africa Company was within the sphere of British influence as defined by the Anglo-German Treaty of October 1886. But part of its territories had been leased to it by the Sultan of Zanzibar on condition that he was to receive certain of the customs dues, and that the powers, rights, and duties of administration were to be 'exercised and performed in his name and under his flag,' and it was not until some years later that these territories were included in the British protectorate.

The chief part of the South Africa Company's territories had already formed the subject of a treaty between Lo Bengula and Queen Victoria in 1888, by which the Chief agreed to have no dealings with a foreign State or Power without the sanction of Her Majesty's High Commissioner for South Africa. But some, at all events, of this Company's territories were not considered to be under a British protectorate, for the British Colonial Secretary informed the High Commissioner for South Africa that 'the Queen can, of course, at any time annex or declare a protectorate over any part of the territory within which the Company operates.'

These facts are clearly not sufficient to justify us in laying down a broad rule to the effect that all the territories of the three African Companies were under British protection from the first; and the case is even stronger against drawing such an inference from the facts surrounding the grant to the British North Borneo Company.

The British Government had declared that it did not intend to acquire sovereign rights in North Borneo; and the Dutch

Were the  
Companies'  
territories  
under  
British  
protection?  
C.—9372  
(1899).  
Scott  
Keltie, 284.

See  
Ch. XXV.  
below.

79 S.P. 868.  
Scott & Keltie,  
411-12.

Scott  
Keltie,  
424.

Opinion of  
the British  
Govern-  
ment with  
regard to  
the British  
North  
Borneo  
Company.  
73 S.P.  
1086-92.  
C.-3109  
(1882),  
pp. 30-33.

Government contended that such a declaration was inconsistent with the grant to the Company of a charter which would have as its result 'the creation of a Company, invested with sovereign rights by the native Chiefs of North Borneo, and subject, as regards the exercise of those rights, to the supreme authority of Her Britannic Majesty's Government.' Lord Granville, however, did not concur in this view. He stated that the territories 'will be administered by the Company under the suzerainty of the Sultans of Brunei and Sulu, to whom they have agreed to pay a yearly tribute,' and that 'the British Government assumes no sovereign rights whatever in Borneo.'

73 S.P.  
1086.  
C.-3108  
(1882),  
p. 204.

His Lordship used similar terms in reply to the protest of Spain against the grant of the charter. He said that the charter merely recognized 'the grants of territory and the powers of government made and delegated by the Sultans in whom the sovereignty remains vested'; and that, in return for incorporation by charter, the Company had surrendered to Her Majesty's Government various powers of control over their proceedings. He further pointed out that no such control would have been reserved to the Crown had the Company taken incorporation in the usual manner by registration under the Companies Acts.

Hansard,  
13 March,  
1882, 718-7.

In the House of Lords he elaborated this argument in considerable detail. As the Crown had acquired no dominion over the territories, it had, he said, incurred no obligation to give military assistance to the Company beyond what is given to all Englishmen engaged in trade in uncivilized countries. And he continued as follows: 'It was first proposed to follow the precedent of the Eastern Archipelago Company, and to provide that the Company should obey the directions of the Secretary of State. But we decided that the power should be confined to a power of objection and dissent in matters affecting foreign Powers and the treatment of the Natives—confined, in fact, to certain limited matters in which the conduct of the Company might conflict with the views and policy of the Government, or with public opinion in this country.'

Hansard,  
17 March,  
1882,  
1191-6.

Mr. Gladstone, the Prime Minister, speaking in the House of Commons, expounded the same view. He acknowledged that the 'remarkable powers' obtained by the Company involved the 'essence of Sovereignty,' but they were 'covered by the Suzerainty of the Native Chief.' He stated that no greater obligation rested upon the Government to protect the Company than to protect any other subject who might be in pursuit of objects not unlawful. The plan adopted by the Government

was, he acknowledged, in the nature of an experiment, but he considered that 'after the many imperfections and defects of our previous methods of proceeding, it is worth our while to make a modest and well-considered trial of this new method of proceeding.'

In passing, we may note that, although the British Government of the day disclaimed any sovereign powers over the territories dealt with in the British North Borneo Company's charter, this disclaimer does not, as is sometimes assumed, furnish authority for the proposition that a Company can acquire sovereign rights in the international sense. For the argument of the Government was that the ultimate powers of sovereignty were in the native Sultans.

*See Des-  
pagnet,  
§ 895.*

When, however, a British Protectorate was formally established over the Company's territories, the Agreement of the 12th May, 1888, between the British Government and the Company, recited that 'all rights of sovereignty over the said territories are vested in the British North Borneo Company,' and that the territories 'are now governed and administered by the Company as an independent State, hereinafter referred to as "the State of North Borneo."' Any sovereign rights which may have been left in the Sultans at the time of the grant of the Company's charter are disregarded—although it is difficult to see how any such rights could remain after the very full transfer of sovereignty by the Sultans to the founders of the Company—and it is agreed that 'the State of North Borneo shall continue to be governed and administered as an independent State by the Company in conformity with the provisions of the said Charter, under the protection of Great Britain.'

*79 S.P. 237.*

Here it might appear that we have the remarkable case of the cession by a British Company of rights of external sovereignty to the British Crown. But when we turn to the provisions of the charter, it is impossible to resist the conclusion that the rights and responsibilities of external sovereignty rested with the British Crown as soon as it had granted the charter. The control of the British Secretary of State was fully provided for in regard to all important political matters; and the provision that the Company was to act in accordance with any suggestions the Secretary of State might make in relation to its dealings with foreign Powers would appear to have carried with it the international responsibility of the British Government. If any foreign Power had felt itself aggrieved by any act of the Company it would, in any complaint it might

have made, have been dealing ultimately with the British Government, which possessed the right to dictate the Company's action in the matter. Even the Government which granted the charter admitted that the Company had the right to expect such military assistance as is given to all Englishmen engaged in trade in uncivilized countries, and it is difficult to see how such assistance could have been withheld if a foreign State had attempted to back up by force any unjust demands upon the Company.

When, in addition to the foregoing considerations, we remember that the cession of sovereign powers to the Company by the Sultans was in an exceptionally complete form; that, according to English Constitutional Law, any acquisition of territory by British subjects is made for the benefit of the Crown; and that the English Crown or Parliament always had the right to withdraw or modify the charter, we are forced to the conclusion that, after the grant of the charter, the British Government represented the Company and its territories to foreign Powers, and that the powers of external sovereignty rested, not with the Sultans or the Company, but with the British Government.

Those considerations apply with even more cogency to the case of the African Companies whose charters, as we have seen, placed them more completely under the control of the British Government, especially with relation to foreign affairs.

It is clear, therefore, that, even before a protectorate had been formally declared, any territories held by these Companies must for international purposes be regarded as having been under the sovereignty of Great Britain. It may not, under such circumstances, be technically correct to call them protectorates. But since, among the great variety of protectorates, the only common and essential features are the duty, on the part of the protecting Power, of protection, and, on the part of the protected Power, of abstaining from all foreign relations not permitted by the protecting Power, it is obvious that, at all events for international purposes, the territories of these chartered Companies were in the same position as British protectorates.

With regard to these later Companies, we therefore come to the same conclusion that we reached in respect of the Companies of the earlier period, namely, that they were not independent sovereigns, and that, when they acquired or exercised rights of sovereignty, at all events rights of external sovereignty, they were acting as agents for the State under whose charter they existed.

Jenkyns,  
171, 195.  
*In re*  
*Southern*  
*Rhodesia*,  
1918, A. C.  
at 221.

The  
African  
Companies.

The  
external  
sovereign-  
ty was in  
the British  
Crown.

See Ch.  
XXIII. below.  
Hall: *Foreign*  
*Powers*, § 92.  
*E. v. Oran*,  
1910, 2 K. B.  
at 619-20.  
See Sir John  
Macdonell in  
*Enc. Brit.*,  
'Protectorate.'

The later  
Companies  
also not in-  
dependent  
sovereigns.

*How the control and responsibility of the State are to be terminated.*

In the case of a mere aggregate of individuals, we have seen that, if their State has allowed them to acquire territory and set up a government without assuming, within a reasonable time, the sovereignty over the territory, a new State will have been born. But in the case of a corporation, something more than a passive indifference on the part of the State which created it would appear to be necessary if that State is to be freed from international responsibility in respect of the corporation's territorial acquisitions, and the only course open to the State which desires to escape responsibility of this kind is to dissolve the corporation. If, on the other hand, the corporation desires to free itself from the control of the State, it must first surrender its charter. It will then be for the State which granted the charter to consider whether it will accept the surrender, and in any case whether it will put forward a claim to any territorial acquisitions that the Company may have made. If it does not enforce such a claim within a reasonable time, it will be open to the individuals who previously formed the Company to set up a new State by establishing an efficient government in the territories they occupy.

See Ch. XL  
above.

See Heim-  
burger, 61.

### Non-National Associations.

An Association need not, however, necessarily have a national character, and if a non-national Association should set up an efficient government over any area, International Law will take account of the *fait accompli*, and international recognition of the new State will be possible.

### *Order of St. John of Jerusalem.*

One of the best examples of a non-national Association is furnished by the Order of the Knights Hospitallers of St. John of Jerusalem. This Order had its origin in a hospital which was established in Jerusalem in the early part of the eleventh century by some Neapolitan merchants for the benefit of poor and sick pilgrims. Round the hospital there grew up a charitable body, whose assistance to the pilgrims and care of the wounded Crusaders after the capture of Jerusalem in 1099 brought it a large number of valuable endowments, so that it owned land all over Europe and became immensely rich.

Porter, W.:  
*Knights of  
Holia.*  
Tasle, J.:  
*Order of St.  
John, etc.*  
*Enc. Brit.,*  
*'St John,'*  
*etc.*

Organizing themselves into a definite Order, the members obtained papal recognition by a Bull of 1113. Shortly afterwards they added to their vows of poverty, obedience, and chastity a military oath to bear arms in defence of Christianity and of the Christian Kingdom of Jerusalem, but never for any other purpose; and volunteers flocked to join the Order from all parts of Europe.

After the fall of Acre in 1291, the Order, being without a home, was allowed by the King of Cyprus to set up its headquarters in that island. But such a position did not satisfy the Knights, and by 1314 they had conquered the island of Rhodes and the neighbouring islands. Here they remained, exercising full rights of sovereignty, for over two hundred years. They built up a strong fleet, entered into commercial treaties with Venice, Pisa, Genoa, and Egypt, and withstood the repeated attacks of the Turks until 1523, when they were forced to capitulate, and withdrew to Candia in Crete.

Subsequently they moved to Civita Vecchia, and remained there, endeavouring to obtain another home, until 1530. In that year the Emperor Charles V ceded to them the islands of Malta and Gozo, together with the fortress of Tripoli in Africa, as a free and sovereign feud, holding under Sicily with the yearly payment of a falcon. By 1551 they had lost Tripoli to the Turks. But Malta remained under their dominion, despite the great siege by the Turks in 1665, until 1798, when the Knights surrendered it to Napoleon Buonaparte.

While the Order occupied Rhodes, and also while it was at Malta—for the overlordship of the Emperor was a purely nominal one—it undoubtedly possessed and exercised to the full the rights of territorial sovereignty. It is true that the cogency of this case as a precedent is weakened by the fact that the Knights were firmly settled in Malta long before the European State system was put upon its present basis by the Peace of Westphalia in 1648. But if, to-day, an Association having no nationality should actually acquire and exercise sovereignty to as full an extent as was done by the Knights of St. John, it would be difficult to refuse its claim to international recognition as an independent State.

#### **States formed by National Associations.**

In two modern instances, an independent State has been formed as the result of the activities of an Association which,

## STATES FORMED BY NATIONAL ASSOCIATIONS 111

although in each case it was of a different character from the trading and colonization Companies which we have considered, has emanated from a single State and so possessed a national character. The Negro Republic of Liberia owes its existence to the efforts of two American philanthropic societies. The late Independent State of the Congo was brought into being by a Belgian association which professed scientific as well as philanthropic objects.

### *Liberia.*

The American Colonization Society for the Establishment of Free Men of Color of the United States was formed in Washington in 1816 with the object of repatriating freed negro slaves, whose numbers were continually increasing in the United States. In 1821 the Society purchased a strip of territory on the West Coast of Africa from the local chiefs and began the settlement. Every subsequent year brought more negroes from America to the settlement, and its limits were extended by the acquisition of more territory from the native chiefs.

As time went on, the parent Society in America accorded to the colonists a larger share in the government of the settlement. In 1828 they were given the power to elect their own officials, subject to the approval of the Governor, who, with his deputy, was to be appointed directly by the Society; and this arrangement was confirmed in a charter which was drawn up for the colony in 1838, and which gave the Society a veto upon all laws promulgated by the Governor and his Council. In 1846 the Society resolved that it was time for the colonists to be granted full self-government, including the management of their foreign relations, and in the following year the colony declared itself to be 'a free, sovereign, and independent State,' and adopted a constitution by which (Article V, Section 18) citizenship of the new Republic was limited to persons of colour. The new State was at once recognized by Great Britain. By the end of 1849 Great Britain's lead had been followed by the other important Powers with the exception of the United States, which withheld recognition until 1862.

In 1857 the neighbouring State of Maryland was included in the Republic of Liberia. This State had resulted from a settlement which had been formed in 1838 by another American Society, founded under the auspices of the State of Maryland in the United States, and having the same objects as the Society that settled Liberia. The colony had declared its independence

Sir H.  
Johnston:  
*Liberia*,  
Ch. IX.  
*Lawrence*,  
§ 46.  
*Twiss*,  
18 *R.D.I.*  
238 *sq.*

355 *P.* 1801.  
Johnston:  
*op. cit.* Ch.  
XII.  
*See also*  
85 *S.P.*  
684 *sq.*

**Maryland.**

at the same time as Liberia, but had not been recognized by foreign Powers.

*The Independent State of the Congo.*

Stanley :  
*The Congo*,  
Chs. III-V.  
Scott  
Keltie,  
Chs. IX. &  
XIV.  
Keith :  
*The Belgian  
Congo, etc.*  
F.O. Hand-  
book, No.  
99.  
Twiss, 15  
R.D.I. 647.

What is now the Belgian Colony of the Congo was at one time an independent State which had been built up by a private Association.

In September 1878, under the auspices of Léopold II, King of the Belgians, acting in his private capacity, the African International Association was founded for the exploration and civilization of Central Africa. The Association had its headquarters in Brussels, but it was an International rather than a Belgian Company, and national committees were formed in various countries to work in co-operation with it.

In 1878, again under the inspiration of King Léopold, there was formed in Brussels, by a number of Dutch, Belgian, French, English, and American gentlemen, the Comité d'Études du Haut Congo, under whose auspices Stanley was commissioned to conduct an expedition and erect stations along the river. Shortly afterwards the Committee returned all the subscriptions that had not come from Belgian sources. There then remained connected with the Committee only those who managed the African International Association, and shortly afterwards the Committee assumed the title of Association Internationale du Congo.

Stanley planted stations and made hundreds of treaties with the native chiefs, and some sort of administration was organized. At the sitting of the Berlin Conference on February 28, 1885, the Association was able to announce that it had concluded, with all the Powers represented at the Conference (except Turkey, who came into line later), 'Treaties which contain amongst their clauses a provision recognizing its flag as that of a friendly State or Government,' and the various plenipotentiaries made speeches welcoming the new State and congratulating its founder, King Léopold. At the final sitting of the Conference, the adhesion of the International Association was announced to the General Act of the Conference, which provided for freedom of trade in the Congo basin and free navigation of the river. Shortly afterwards the Belgian legislature authorized King Léopold to assume the sovereignty of the new State, the union between that State and Belgium to be an exclusively personal one; and later on the Association announced that its possessions were henceforth to form the Congo Free State.

**Conclusions.**

Summing up, we may say that, so long as a corporation is working under a charter granted by a State, it can only acquire sovereignty in the international sense for the benefit of that State ; but that, if it has got rid of its national character, or has never possessed such a character, it can, by setting up a proper government over territory not previously belonging to a member of the International Family, prepare the way for its recognition as an independent State.

## CHAPTER XIII.

### COLONIES AND SEPARATE PORTIONS OF A STATE.

#### *Colonies.*

Colonies  
can  
acquire  
only for  
the whole  
State,

A MOTHER country and its colonies are under a single sovereignty for the purposes of International Law, and any territorial acquisitions made by a colony are thereby brought under the sovereignty of the whole State, although that State may leave their administration to the colony. The question of making annexations is thus one ultimately for the parent Government.

The Aus-  
tralian  
colonies  
and New  
Guinea.

*Ann. Reg.*—  
1883: 393-400.  
1884: 432-33.  
76 S.P. 776.  
Lawrence, § 74.  
F.O. Hand-  
books Nos.  
42, 86 & 139.

This point was well brought out in the circumstances connected with the acquisition by Great Britain of part of the island of New Guinea. Under the influence of rumours that Germany was prepared to colonize New Guinea, the Queensland Government, in April 1883, hurriedly annexed the greater part of that island, together with many of the adjacent small islands, in the name of the Queen, pending the decision of the Imperial Government. This annexation the British Cabinet refused to ratify, and the action of the colonial authorities was consequently ineffective.

76 S.P. 612.

The decision of the British Government caused considerable disappointment in Australia. A Convention of the representatives of the Governments of the several Australasian colonies was held at Sydney, and adopted several important resolutions. One of these urged that so much of New Guinea as was not claimed by the Government of the Netherlands should be incorporated into the British Empire, 'while fully recognizing that the responsibility of extending the boundaries of the Empire belongs to the Imperial Government.' Another resolution called upon the Home Government to forbid any further extensions of non-English power in the Pacific south of the Equator.

In response to the pressure of colonial opinion, the British

Cabinet decided to establish the Queen's protectorate over the south-east portion of New Guinea—which is opposite to Queensland—and some of the smaller islands. The protectorate was proclaimed in November 1884. By the end of that year the rest of the territories that had been included in the action of the Queensland Government were divided between Germany and Great Britain. Zb. 286.

The same doctrine was insisted upon by the German Government at the time of the German acquisition of South-West Africa. The Cape Parliament had decided in favour of placing that territory under the authority and protection of Great Britain, and the German Ambassador informed Lord Granville that 'if the Cape Government were to carry out the decisions they have adopted, the English Government could not divest themselves of the responsibility for them.' About the same time a German official informed the Government of Cape Colony that these territories had been placed under German protection, and the German Ambassador in London was directed to tell the British Government that the notification to the colonial authorities arose from a mistaken execution of instructions. 'The Imperial Government,' the German Ambassador told Lord Granville, 'hold firmly to the opinion now, as before, that they entertain direct international affairs only with the Royal British Government itself, not with the Colonial Government, and regret that in the foregoing case the correct form was not observed by the Commander of the *Elisabeth*.' Germany and South-West Africa.  
76 S.P.  
540-1.  
  
78 S.P. 550.

In this connection it is interesting to notice that when a British colony has annexed territory it has usually first obtained the authorization of the Crown. For example, in 1875 the Cape Legislature resolved that it was expedient that certain territories in South-East Africa should be annexed to the Colony. The following year, the Queen, by Letters Patent, authorized the Governor of the Cape of Good Hope to annex those territories, but not until the Cape Legislature should have passed a law providing for their incorporation into the Colony. Such an Act, reciting the Letters Patent, was passed in 1877; and in 1879 the Governor declared the territories to be part of the Colony. Procedure adopted when an annexation is carried out by a British colony.  
87 S.P. 581.  
  
88 S.P. 103.  
70 S.P.  
1254-6.

#### *Other portions of a State.*

Similar principles apply where certain areas, which for some purposes may be quite distinct, are incorporated under one sovereignty from the international standpoint. Any acquisition Portions of a State of International

Law can  
acquire  
only for  
the whole  
State.

**The British  
self-governing  
Dominions.**

*See The Times*,  
3 Feb., 1925,  
p. 13.

*See Ch. XXVI.  
below.*

Cmd. 12013-4  
(1921).

*See also* Cmd.  
2610 (1925).

**United States.**

Story :

*Comments*, *loc.*  
§§ 1266-7.

*Doones v.*

*Badinell*,

182 U.S. 244

*Dorr v. U.S.*,

196 U.S. 198.

**German**

**Empire.**

Dodd :

*Modern*

*Constitu-*  
*tions*, 327.

tions by one part of such a composite State must, for international purposes, be made on the responsibility of the sovereign of the whole, although, here again, the sovereign may leave the administration of any such acquired territory to the Government of any part of his dominions.

Thus the British self-governing Dominions, even for some international purposes, such as membership of the League of Nations and representation at some international conferences, are treated as if they were separate States. Nevertheless, the League of Nations Mandates for the territories which are administered by the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa respectively were stated to be 'conferred upon His Britannic Majesty for and on behalf of the Government' of the Dominion in question.

According to the Constitution of the United States, questions of peace and war and the conclusion of treaties are reserved exclusively to the Federal Government, but no express provision is made with respect to the addition of new territories—other than States—to the Union. At the time of the purchase of Louisiana from France, it was argued that the power must belong to the Government of the Union, because the right to acquire territory is incidental to national sovereignty, and is 'a resulting power, growing necessarily out of the aggregate powers confided by the Federal Constitution,' and this view has been upheld by the Supreme Court of the United States.

In the case of the German Empire, although its component parts were allowed to have separate relations with other Powers to a small extent, in all important international affairs the Imperial Government was supreme and represented the whole Empire, and matters relating to colonization were expressly reserved to it by Article IV of the German Constitution.

## CHAPTER XIV.

### STATES AND PLURALITIES OR LEAGUES OF STATES.

From the discussion in the preceding Chapters it follows that International Law recognizes a capacity to acquire territorial sovereignty as belonging only to States. But does it concede that capacity to all States?

Can all  
States  
acquire?

We have seen that States which are combined with others to form a single international person do not possess that capacity in their separate right. On the other hand, a State which is only under the protection of another is not necessarily devoid of the capacity to acquire territorial sovereignty. And this is so even where the foreign affairs of the protected State are entirely conducted by the protecting State, so long as the two States retain their separate individualities in international matters, as, for example, was the case with the Ionian States while they were under the protection of Great Britain. Those States were at peace when Great Britain was at war, and Great Britain concluded separate treaties for them with foreign Powers as on behalf of a distinct and separate State. It may, of course, be that the arrangements made between the protector and the protected State preclude the latter from adding to its territory, and in any case the protecting State would be within its rights in objecting to the assumption by the protected State of responsibilities which would render the duty of protection more onerous.

See Ch.  
XIII.  
above.  
Protected  
States.

See Ch.  
XXIII.  
below.

A permanently neutralized State, such as Switzerland, is free to enter into international relationships on its own account so long as it does not form alliances or do anything else that might possibly lead to a breach of its neutrality. Any addition to the territory of a neutralized State might, however, have the result of weakening its defensive forces and adding to its risks and liabilities, and it would appear, therefore, that a neutralized State should not make territorial acquisitions without the consent of the Powers which have guaranteed its neutrality.

Permanently  
neutralized  
States.  
Oppenheim,  
§ 67.

Westlake,  
I. Ch. III.  
Despagnet,  
§ 186.

Belgium, whose independence and perpetual neutrality were at the time guaranteed by Great Britain, Austria, France, Prussia and Russia, acquired in 1908 a vast colony on the Congo from King Léopold under a Treaty of Cession dated the 28th November, 1907. The Powers then guaranteeing Belgium's neutrality were ready to acquiesce in an arrangement which offered a way out of the difficulty which had been created by the régime set up under King Léopold's rule in the Congo Free State; and they afterwards recognized the transfer as reforms were introduced.

A permanently neutralized State which added to its territories without the express sanction of the guaranteeing Powers would not, however, it would soon, have any right to call upon those Powers to assist it in defending such additional territory.

Some States, such as China, Siam, and Abyssinia, are for most purposes controlled in their external relations by International Law, but cannot perhaps yet be said to be full members of the Family of Nations. Where, however, such a State was in actual control of territory, it would not appear that its title thereto could be questioned merely on the ground that the acquisition was a recent one. But such a State must be in a position to comply with the requirement of effective occupation.

In this connection the position of the Sultan of Zanzibar is interesting. In 1886 he adhered to the provisions of the General Act of the Berlin Conference, in accordance with Article 37 of that Act which provides for the adhesion of non-signatory Powers. He thus agreed to the declaration contained in Articles 34 and 35 relative to the conditions to be observed in making occupations upon the coasts of Africa. Despagne and Salomon considered that the Sultan's right to occupy new territory would be recognized. The question is complicated by the fact that, in 1890, Zanzibar was declared to be a British protectorate. But, apart from the relationship between the Sultan and Great Britain, there appears to be no reason why he should not have a good title to any territory that he might occupy effectively. The reply of the German Government in 1885 to the protest of the Sultan against the proclamation of the German protectorate in East Africa implied as much. For, after stating that the native Princes with whom the German treaties had been concluded were at one time independent, it proceeded to argue, not that the Sultan was incapable of acquiring sovereign rights over them, but that the actual relationship

See Ch.  
XXI.  
below.  
100 S.P.  
705.

*Statesman's*  
*Year Book,*  
1925,  
p. 702.

States not full  
members of  
the Interna-  
tional Family.  
Wheaton, p. 20.  
Pitt  
Cobbe, I. 48.  
Hall, I. I. § 4.

Zanzibar.  
Despagne,  
§ 386.  
77 S.P. 816.

See Ch.  
XIX. below.  
§ 396.  
§ 46.

77 S.P.  
1113.

between the Sultan and their territory did not furnish evidence of such an acquisition by him.

As we have already noticed, a State sometimes binds itself, by agreement with another State or other States, not to acquire rights over certain territory, such an undertaking being sometimes coupled with a recognition that the territory in question falls within the sphere of influence of the other State, and sometimes being in the form of a mutual agreement to respect the independence of a third State.

States which have undertaken not to acquire certain territory. See Ch. VIII. above.

### *Condominiums.*

In one or two cases, States have taken possession of territory jointly. It cannot, however, be said that such arrangements have, as a rule, proved satisfactory from the political and administrative point of view. Still in force are the condominiums exercised by Great Britain and France in the New Hebrides and by Great Britain and Egypt in the Soudan; while, prior to the partition of the Samoan Islands between the United States and Germany in 1899, the Group, though nominally independent, had for ten years been under the joint control of Great Britain, the United States and Germany.

See Smuts: *The League of Nations*, etc., p. 18.

See Ch. XXV. below. F.O. Handbooks, Nos. 42, 144 & 146.

The Franco-British condominium in the New Hebrides was set up under conditions which, in the view of the British and French Governments, were without precedent, owing to the absence from the Islands of any political organization which could be utilized for the purpose.

Great Britain and France in the New Hebrides. F.O. Handbook, No. 147. 99 S.P. 229 *sq.* 100 S.P. 519 *sq.* Cd. 3288 & 3300. (1907).

The French and British settlers and traders, no less than the natives themselves, had suffered from the lack of a civilized Government; but neither Great Britain (notwithstanding the urgent representations of the Australian and New Zealand Governments) nor France would annex or proclaim a protectorate over the Islands, nor would either Power agree to such a step on the part of the other. A Joint Naval Commission, composed of officers from the British and French naval stations in the Pacific, was formed in 1887 and charged with the duty of maintaining order and protecting the lives and property of British and French nationals. But the Commission found that it was impossible satisfactorily to carry out its duties, and, by the Convention of the 20th October, 1906, the two Powers agreed to establish a definite condominium over the New Hebrides, including the Banks and Torres Islands.

The conditions of the condominium were carefully worked out with a view to ensuring that each Power should have

identical rights and responsibilities with regard to the government of the whole of the Archipelago, and should not be in a position of advantage with respect to the other. The arrangement was referred to by the British Government on one occasion as being 'in the nature of a joint protectorate,' and on another occasion, as a joint assumption of jurisdiction; while the French Government regarded it as a taking possession of the Islands *en commun*.

The Convention of the 20th October, 1906, provided that, in order, among other things, to secure the exercise of the paramount rights (*droits de souveraineté* in the French text) of the two Powers, the Islands should 'form a region of joint influence,' in which the subjects and citizens of the two Signatory Powers should enjoy 'equal rights of residence, personal protection, and trade, each of the two Powers retaining jurisdiction over its subjects or citizens, and neither exercising a separate control over the Group.'

The Convention went on to provide that subjects or citizens of other Powers should enjoy the same rights and be subject to the same obligations as British subjects or French citizens, and should be required to opt for the legal system and jurisdiction of Great Britain or of France.

There were to be two High Commissioners, one appointed by each of the Signatory Powers, who were to legislate by means of Regulations issued jointly. The following public services were to be undertaken in common, namely, police, posts and telegraphs, public works, ports and harbours, buoys and light-houses, public health, and finance. Each Power was to defray the expenses of its own administration, the expenses of the Joint Court and of the public services undertaken in common being defrayed out of local taxes, which were to be imposed by the High Commissioners jointly. No native was to acquire in the Group the status of subject or citizen of, or be under the protection of, either of the two Powers.

These provisions were amplified and improved, and the joint control extended and further regularized, by a Protocol which was signed on behalf of the two Governments in August 1914, and ratified in 1922.

The Anglo-Egyptian condominium over the Soudan was set up by the Agreement of the 19th January, 1899, between the British and the Khedivial Governments. It was based upon the re-conquest of the rebellious provinces 'by the joint military and financial efforts' of the two Governments. The British

Omd. 1691  
(1922).  
114 S.P.  
212.

Great  
Britain and  
Egypt in  
the Soudan  
Cromer:  
*Modern  
Egypt*, ch.  
xxxiii.

and Egyptian flags were to be used together, and the supreme military and civil command in the Soudan was vested in a Governor-General, who legislates by proclamation, and who is appointed by Khedivial Decree on the recommendation of the British Government. When Egypt was recognized by Great Britain to be an independent sovereign State, the question of the Soudan was one of the matters that was left over for future discussion.

F.O. Hand-  
book, No.  
98, p. 166.

See Ch.  
XXV.  
*below*.

### *The League of Nations.*

There would appear to be no reason in law why the League of Nations should not acquire and hold territorial sovereignty. The International Association of the Congo was recognized as the sovereign of the Congo Free State although it held no other sovereignty and had no forces of its own outside the territory ; and, for the present purpose, the League has this advantage over the Association, that it is composed exclusively of States each of which is already a territorial sovereign.

The  
League of  
Nations  
might  
become a  
territorial  
sovereign.

As the Association organized and employed its own administrators and police and military forces for the Congo Free State, so it would appear possible for the League of Nations similarly to provide for the administration and protection of any territory over which it might acquire sovereignty ; the possibility of such a course was, in fact, contemplated in President Wilson's second and third drafts of the Covenant. On the other hand, just as a sovereign State may delegate its powers of administration and control over a part of its territory to the Government of another part or to a Company, so there would appear to be no reason why the League of Nations should not exercise, through the medium of any State or other body which it might appoint for the purpose, any sovereignty which might be transferred to it.

Baker ;  
Woodrow  
Wilson, *etc.*  
III. 108 *sq.*

See Chs.  
XII. &  
XIII.  
*above*.

Up to the present, however, it does not appear, for reasons which will be discussed in Chapter XXVI, that any territorial sovereignty has ever been acquired by the League.

The League  
has not yet  
acquired any  
territorial  
sovereignty.

## CHAPTER XV.

### CONCLUSIONS.

THE conclusions we have arrived at in Part II may be summed up as follows :—

The capacity to *acquire* beneficially territorial sovereignty is possessed only by States which have a separate international existence, and are in a position to comply with the requirement for effective occupation ; or by pluralities or leagues of such States. But the fact that such a State is under the protection of another State is not in itself sufficient to deprive the protected State of that capacity.

Colonies and other subordinate parts of a single State of International Law can acquire only in the name of the sovereign of the whole State.

Acquisitions made by a Company working under a national charter accrue to the State that granted the charter.

Although International Law does not recognize the right to *acquire* territorial sovereignty in non-national Associations, or in individuals—whether acting separately or in parties—yet if a non-national Association, or an individual or group of individuals, *has acquired de facto* sovereignty over any area and set up an efficient government there, International Law takes account of the *fait accompli*, so far at any rate as to declare that the area in question is not *territorium nullius*.

In the case of a non-national Association, or a group of individuals not belonging mainly to some one State, international recognition of the new State will be justifiable so soon as an efficient government has been established. But where the individual is the subject of a State, or the group is made up wholly or mainly of the subjects of some one State, that State will have the right, during a reasonable time, to insist upon the allegiance of its subject or subjects, and claim that the sovereignty has been acquired for its benefit.

## PART III.

### THE METHODS OF ACQUISITION AND RELATED MATTERS.

#### CHAPTER XVI.

#### SCOPE OF PART III.

HAVING in the foregoing Parts dealt with the territory over which sovereignty is acquirable, and considered the limitations of the rule that States, and States alone, possess the capacity to make an acquisition for their own benefit, we will now inquire how an acquisition is to be made, that is to say, what are the steps that may or must be taken, the conditions that must or should be complied with, if a State is to obtain a valid title to the whole or part of the sovereignty over backward territory.

We shall, in the first place, treat the matter historically, and review the facts which the European nations have recognized at different times as giving to one of them a full or contingent title that was good as against the others, considering in succession Papal Grants, Discovery, Effective Occupation, Conquest, Cession, and Prescription. We shall then deal with Colonial Protectorates, Spheres of Influence, and Leases and analogous modern methods of acquiring incomplete sovereignty or earmarking territory for future appropriation; and we shall consider the nature and effect of the most recent international mode of tenure and method of acquisition—the Mandatory system of the League of Nations. Lastly, following a discussion as to the extent of territory which can be acquired by an act or process of appropriation in certain cases, and of certain matters connected with territorial frontiers or boundaries, we shall deal with questions connected with the Agents whom the State may employ, and the formalities that ought to be observed, in making an acquisition of territory that was not previously under the sovereignty of a member of the International Family.

## CHAPTER XVII.

### PAPAL GRANTS.

At the time of the great discoveries, the Popes claimed the power to grant to Christian monarchs the right to acquire territory in the possession of heathens and infidols. This power was based in part on the authority which the Popes had for a long time claimed over things temporal as the Vicars of Christ on earth, in part upon the authority supposed to have been derived from the forged 'Donation of Constantine.' 'If,' said Pope Gregory VII, in excommunicating the Emperor Henry IV in 1077, 'ye are able to bind and to loose in heaven, ye are likewise able on earth, according to the merits of each man, to give and to take away empires, kingdoms, principdoms, marquisates, duchies, countships, and the possessions of all men. For if ye judge spiritual things, what must we believe to be your power over worldly things?' By the 'Donation of Constantine,' a document which was forged between the middle of the eighth and the end of the ninth centuries, the Emperor Constantine was supposed to have ceded to Pope Sylvester I the sovereignty not only over Italy and the western regions, but also over all islands.

Walker,  
§ 52.

Papal  
claim to  
temporal  
power.

Nys:  
*Les origines*  
etc., 306.

Bryce:  
*Holy*  
*Roman*  
*Empire*,  
Ch. X.

ib. Ch. VII.

C.—9501  
(1899), vii.

Papal claim to  
dispose of  
heathen and in-  
fidel countries.

Prescott:  
*Ferdinand &*  
*Isabella*, I. xviii.  
See also C.—9501  
(1899), xv.

Schmauss,  
II. 2156.  
See also C.—9501  
(1899), viii.

Prescott considers that the opinion that the Pope, as Vicar of Christ, had authority to dispose of all countries inhabited by heathen nations in favour of Christian potentates was as old as the Crusades. When, however, Hadrian IV in 1155 gave Ireland to King Henry II of England, he claimed jurisdiction only over Christian islands:—

Sane omnes insulas, quibus sol justitiæ Christus illuxit, & quæ documenta fidei Christianæ susceperunt ad Jus Sancti Petri & sacrosanctæ Romanæ Ecclesiæ (quod tua etiam nobilitas recognoscit) non est dubium pertinere.—

Hobbes:  
*Leviathan*,  
Ch. XLII.

and there were always to be found those who declared that the authority of the Pope did not extend over non-Christian

countries. St. Thomas Aquinas bases the right of the Church to deprive infidel rulers of their authority over the faithful, not upon any general power of disposing of the territories of infidels, but upon the principle that the subjects have become the sons of God :—

*Summa*,  
sec. sec<sup>o</sup>,  
Q. 10, Art.  
10.

quia infideles merito suae infidelitatis merentur potestatem amittere super fideles, qui transferuntur in filios Dei.—

and at the Council of Constance in 1415, Paul Wladimir de Brudzewo denied, with qualifications, that the Pope could confer the power to despoil infidels of their lands and goods.

*Nys. Ch.*  
VII.

In 1844, however, Clement VI had granted the Canary Islands, or *Fortunatae Insulae*, to Louis of Spain as a tributary of the Apostolic See upon his promise to lead the islanders to the worship of Christ; and in the fifteenth century the papal claim to dispose of the lands of heathens and infidels was, as we have already had occasion to notice, in active exercise.

*See Ch.*  
IV. above.

The Empire of Guinea was granted to the Crown of Portugal by Nicholas V, with the power to subdue all the barbarous nations therein; and in the famous Bull, 'Inter Caetera,' of Alexander VI (1492) the claim is set forth in no halting manner.

*Philimore*,  
I; CCXXXI  
*Bull of*  
*Alexander*  
*VI to*  
*Ferdinand*  
*and*  
*Isabella*.  
*Hazard*, 3.

By the last-named Bull, the Pope granted to Ferdinand and Isabella all islands and mainland not possessed by Christian Princes, found and to be found, discovered and to be discovered, towards the West and South on one side of a line drawn from the North Pole to the South Pole at a hundred leagues west of the Azores and Cape Verde, whether the mainland and islands were towards India or any other part. He made the grant, not on account of any petition of theirs, or of anyone else on their behalf, but of his own pure liberality, sure knowledge, and fullness of Apostolic power, and with the authority of Almighty God bestowed on him through blessed Peter, and of the Vicarship of Jesus Christ by which he acted upon earth—

motu proprio, non ad vestram vel alterius pro vobis super hoc nobis oblatae petitionis instantiam, sed de nostra mera liberalitate, et ex certa scientia, ac de apostolicae potestatis plenitudine . . . auctoritate omnipotentis Dei nobis in beato Petro concessa, ac Vicariatus Jesu Christi qua fungimur in terris.

All others, even though they were of imperial or kingly dignity, were prohibited under penalty of excommunication from approaching, whether for trade or otherwise, without the licence of Ferdinand and Isabella, the islands and countries granted.

The papal claim to dispose of heathen lands was not universally admitted.

Walker, § 123.

Salomon, § 16.

Nys, Ch. VII.

Victoria.

Las Casas.

Prescott:

Ferdinand

& Isabella,

II. Ch.

VIII.

(note).

Ferdinand

and

Isabella.

ib. L Ch.

XVIII.

ib.

Opposition to the papal claim in England, France and Holland.

The powers of the Pope over heathen territories were still, however, disputed, even by some theologians. Victoria, a member of the Dominican Order, maintained that the Pope had no right to give away the lands of barbarians, since he had not over them that spiritual power upon which his temporal authority was based. But he allowed to the Pope the right to commit the evangelization of the barbarians to a single nation to the exclusion of all others, and even, if the cause of Christianity demanded it, to prohibit all others from trading with the barbarians; and he considered that any Christian converts had come under the authority of the Pope, by whom a Christian prince might be given to them. Las Casas, too, while he maintained the right of the Pope to confer upon the Spanish sovereigns imperial supremacy over all lands discovered by them, held that such supremacy could be granted over such nations only as voluntarily embraced Christianity, and not to the prejudice of authorities already existing there.

Even in the application of Ferdinand and Isabella for the authority which was subsequently granted to them in the Bull 'Inter Ocelera,' they stated that they applied as dutiful children of the Church, although many competent persons deemed such an application to be unnecessary in respect of territories already in their possession; and, little more than a year after they had obtained the Bull, they varied one of its provisions in the Treaty of Tordesillas which they made with Portugal on the 7th June, 1494. By this Treaty, the line which the Pope had decreed was to mark the eastern edge of the region within which the Spaniards had the exclusive rights of navigation and discovery was moved two hundred and seventy leagues farther west—a variation of the Pope's grant which did not receive papal sanction until 1506.

But if the right of the Pope to decide how the non-Christian world was to be partitioned among Christian princes was not considered to be absolute by the Spanish and Portuguese sovereigns, in whose favour it had been freely exercised, much less was it recognized by the other European rulers who, under its authority, found themselves excluded from competing for the wealth and dominion of the New World and the East.

Henry VII of England sent out the Cabots in 1495, French and Dutch navigators followed, and these three nations were soon disputing with Spain in the West and Portugal in the East the rights which those Powers claimed under the sweeping terms of the papal bulls.

Francis I of France asked to see the clause in Adam's testament which entitled Spain and Portugal to divide the New World between them.

Prescott:  
*Alonso*,  
VII. (Ch. I.  
*See also*  
Payne, I. 223.  
Camden;  
*Elizabeth*,  
II. 116.

Elizabeth told the Spanish ambassador that 'she understood not, why hers and other Princes subjects, should be barred from the Indies, which she could not perswade her selfe the Spaniard had any rightfull title to by the Byshop of Romes donation, in whom she acknowledged no prerogative, much lesse authority in such causes, that he should bind Princes which owe him no obedience, or inloofe as it were the Spaniard in that new World, and invest him with the possession thereof: . . . but that other Princes may trade in those Countries, and without breach of the Law of Nations, transport Colonies thithor, where the Spaniards inhabite not.'

The Peruvian Inca was not unreasonable when, hearing of the Popo and his commission to the Spaniards for the first time, he told Pizarro that the Popo 'must be crazy to talk of giving away countries which do not belong to him.'

Prescott;  
*Peru*, III.  
(Ch. V.

Grotius was only voicing the opinion generally held in England, France, and Holland, when he denied that the Popo had any authority over the peoples occupying the hitherto unknown parts of the world.

Mare  
*Liberum*,  
Ch. VI.  
*De iure, etc.*,  
II. XXII. XIV.

The decisions of the Popes no doubt served a useful purpose to Spain and Portugal in delimiting the fields of their activities, for both of these nations benefited under them and were prepared to adopt them as the basis of their relations with one another. But they could have no validity as against the other Powers of Europe, by whom, at all events from the end of the fifteenth century, their authority was repudiated and their provisions disregarded. The subsequent course of events made this abundantly clear to Spain and Portugal; and although those countries continued until the early part of the nineteenth century to regard Alexander's Bull as valid, they recognized the wisdom, in their dealings with other nations, of reinforcing their claims under papal grants with appeals to rights based upon discovery.

Prescott;  
*Ferdinand*  
*de Isabella*,  
I. XVIII.

It is interesting to note that as recently as 1876 the Venezuelan Minister for Foreign Affairs, in the controversy with Great Britain, referred, in support of the Spanish title to territory in America, to the Bull of Pope Alexander VI, which, he said, 'now amounts at least to a fresh and most valuable recognition, whilst at that time it was of decisive significance.'

F.O. Hand-  
book, No.  
141, p. 26.  
*Johnson v.*  
*M'Intosh*,  
8 *Wheat.*  
*Reps.* at  
374.  
*Wheaton*,  
p. 270.  
A recent  
reference  
to Alex-  
ander's  
Bull.

C.-7972  
(1866), 287.  
C.-9338  
(1869), 180.  
C.-9500  
(1869), 118.  
C.-9501  
(1869), 111.  
to xvi.

Great Britain refused to allow any validity to the Bull except as between Spain and Portugal, and in the Venezuelan counter-case, in the subsequent arbitration proceedings, Venezuela was content to maintain that, although papal authority, as a basis of territorial title, might not avail at the close of the nineteenth century, there was no doubt as to its acknowledged competency at the close of the fifteenth.

## CHAPTER XVIII.

### DISCOVERY:

THE papal claim to grant to particular nations the sole right to acquire dominion over non-Christian countries had broken down under the refusal of the English, French, and Dutch to allow the greater part of the world to be closed to their enterprise; but the place it had occupied in international affairs could not be left vacant. If it was to be possible for a nation to support a claim to any lands that it did not hold by force, some fact had to be found which the European nations would recognize as giving to one of them a title good as against the rest. They were all too eager to secure as much as possible of the continent that was gradually disclosing itself to refrain from claiming any part of it of which they were not in actual possession. Its great extent made it possible to base a claim to a large area upon the performance of comparatively trivial acts, and the rule came to be accepted that discovery by the representative of one nation was sufficient to exclude all the others from the region discovered.

'The potentates of the old world,' said Chief Justice Marshall, 'found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.'

Justice Story to the same effect says: 'It may not be easy upon general reasoning to establish the doctrine that priority

Chief  
Justice  
Marshall.  
*Johnson v.*  
*M'Intosh*,  
8 Wheat.  
Rep. at  
573.  
*See also*  
*Worcester*  
*v. State*  
*of Georgia*,  
6 Peters at  
543.

Justice  
Story.

*Commentaries*, § 2.

of discovery confers any exclusive right to territory. It was probably adopted by the European nations as a convenient and flexible rule by which to regulate their respective claims. For it was obvious, that in the mutual contest for dominion in newly discovered lands, there would soon arise violent and sanguinary struggles for exclusive possession, unless some common principles should be recognized by all maritime nations for the benefit of all. None more readily suggested itself than the one now under consideration; and as it was a principle of peace and repose, of perfect equality of benefit in proportion to the actual or supposed expenditures and hazards attendant upon such enterprises, it received a universal acquiescence, if not a ready approbation. It became the basis of European polity, and regulated the exercise of the rights of sovereignty and settlement in all the cisatlantic Plantations.'

*Wide claims based upon Discovery.*

Under this doctrine extravagant claims were made. The Spaniards used it to fortify the claim which they made under the papal grant to exclude from the New World all the European nations except Portugal, which country had acquired, under the Treaty of Tordesillas, rights to Brazil. The English claim to North America was grounded upon the discoveries of Cabot who, in 1497, had sailed along its coast from 56° to 38° N. latitude and claimed for England all the territory from the Gulf of Mexico to the most northern regions. No English settlements were made, however, and shortly afterwards the French king claimed the same region in virtue of a similar title.

When, at the beginning of the seventeenth century, the English Crown granted to English Companies rights over an area in North America which extended from one side of the continent to the other, with a depth from north to south of nearly a thousand miles, there were only a few straggling settlements along the east coast, the interior of the continent was quite unexplored, and the most that could be said in favour of English activity upon the west coast was that Drake had sailed along it in 1578. This area included the district between the Delaware and the Hudson, which district was claimed, also upon the ground of discovery, by the Dutch, who founded a settlement there. But the English asserted their rights even over the part actually settled by the Dutch, and the Dutch settlement, at what was afterwards called New York, was compelled to surrender to an English force in 1664.

Prescott:  
*Ferdinand &  
Isabella*, II. LX.  
*Johnson v.  
M'Intosh*,  
8 Wheat.  
Reps. at 575-6.  
Story: *Com-  
mentaries*, § 1.  
Payne, I.  
214, 224-5 &  
238-40.

*Johnson v.  
M'Intosh*,  
vi. 8. 24  
575-6.  
Story:  
*op. cit.*,  
§§ 111, 112,  
152.

*Opinions of Jurists.*

It was no more reasonable for a nation to claim a vast extent of territory upon the mere ground that a national ship had been the first to coast along its shores than to base similar pretensions upon a papal grant. No rights of property were recognized in Roman Law as following upon mere discovery; and little respect was shown by writers for claims of this character.

Grotius did not recognize discovery as giving a full title. In Chapter II of his '*Mare Liberum*,' in which he sets out to prove that the Spaniards had no right, in virtue of discovery, to dominion over the Indies to which the Dutch sailed, he maintains that no title can be acquired by discovery without the taking of possession:—

Si dicent inventionis praemio eas terras sibi cecidisse, nec jus, nec verum dicent. Invenire enim non illud est oculis usurpare, sed apprehendere . . . ad titulum dominii parandum eam demum sufficere inventionem quae cum possessione conjuncta est.

'The bare seeing a thing,' wrote Pufendorf, 'or the knowing where it is, is not judged a sufficient Title of Possession.'

'All concur,' said Sir William Scott (afterwards Lord Stowell) in giving judgment in the case of *The Fama* (1804), 'in holding it to be a necessary principle of jurisprudence, that to complete the right of property, *the right to the thing*, and *the possession of the thing* itself, should be united. . . . This is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, where a title is meant to be established, *for the first time*, some act of possession is usually done and proclaimed as a notification of the fact.'

Twiss and Luzac profess to find the principle upon which title by discovery is based in the following quotation from Wolff:—

Pareillement si quelqu'un renferme un fond de terre dans des limites, ou le destine à quelque usage par un acte non passager, ou que se tenant sur ce fond limité, il dise en présence d'autres hommes qu'il veut que ce fond soit à lui, il s'en empare.

It should be noticed, however, that Wolff requires that the area of which possession is taken, otherwise than by a non-transitory act, shall have been enclosed and entered upon by the proprietor. This is brought out more clearly in Formet's edition of Wolff's '*Principes*,' in which the last case referred to

Dig. XII. 1 & 2.  
Twiss, § 110, and  
Oregon, 186.  
Moore's  
Digest, I. 280.  
Tartarin,  
§§ 7 & 18.  
Grotius.  
See also  
De Jure, etc.  
II. II.  
II. 5 &  
II. XXII.  
IX.

Pufendorf.  
IV. VI.  
VIII.  
Lord  
Stowell.  
8 Robinson's Reps.  
at 116.

Twiss.  
Luzac.  
Twiss.  
§ 110.

in the quotation on which Luzac and Twiss rely is stated as follows :—

II. II.  
XXXV.

Il l'aquiert aussi, si se tenant sur ce terrain, dont il a marqué les limites, il déclare hautement et en présence des autres, qu'il se l'approprie.

*The Governments abandon their extravagant Claims.*

By the European States themselves the extravagant claims that had been based upon discovery were found to be untenable. The Spanish pretensions to exclusive dominion in the New World had long been a dead letter, and were given up by Spain when, in a controversy with Great Britain in 1790 with regard to Nootka Sound, she based her claim to the entire north-west coast of America, not upon a general right to the whole continent, but upon the discovery of this particular part of it, coupled with long possession confirmed by the Treaty of Utrecht. And even this claim was not sustained, for, by the Treaty of the Escorial of 1790, the right of the English to make settlements at places not actually occupied was acknowledged by Spain.

Twiss :  
*Oregon*,  
110 sq.  
Wheaton,  
p. 271.

13 S.P. 512.

Twiss :  
*Oregon*,  
266.

Great Britain, in the Oregon controversy, declared that ' she could never admit that the mere fact of Spanish Navigators having first seen the Coast at particular Points, even where this was capable of being substantiated as the fact, without any subsequent or efficient Acts of Sovereignty or Settlement following on the part of Spain, was sufficient to exclude all other Nations from that portion of the Globe.' And on behalf of the United States, which had succeeded to the Spanish title, it was stated that it was not their intention ' to repose upon any of the extreme pretensions of that Power to speculative Dominion in those Seas, which grew up in less enlightened Ages, however countenanced in those Ages.'

13 S.P. 513.

Twiss :  
*Oregon*,  
268.

Wheaton, p. 278.

Twiss, § 118.

Martens

*Recueil*,

1st Series,

2nd Edn. I. 110.

*Johnson v.*

*M'Intosh*,

8 Wheat.

Reps. at 583.

I. Moore's  
*Digest*, 264-5.

In the same controversy, the representatives of Great Britain acknowledged that the British charters granting large areas extending from one side of the continent to the other were valid only as against other British subjects. These broad claims had been definitely abandoned by Great Britain in the Treaty of Paris of 1763, which fixed the western boundary of her possessions along the middle of the River Mississippi.

*The Oregon Controversy.*

The controversy between Great Britain and the United States with reference to the Oregon territory is one of the most

Twiss : *The Oregon Question*, etc.

important cases involving questions of discovery. The dispute related to a large tract of country on the north-west coast of North America between the Rocky Mountains and the Pacific Ocean, and there were several attempts between 1818 and 1845 to come to an agreement. The United States had first proposed that the boundary line between British and United States territory should run along the 49th parallel of N. latitude. Great Britain contended that it should follow the course of the Columbia River. The principal facts bearing upon the question of discovery are set out below in chronological order.

Wheaton,  
p. 278 *sq.*  
Douglas,  
U.S. Geo-  
logical  
Survey,  
Bulletin  
889,  
pp. 11 *sq.*

1578.—Drake, according to the British contention, explored the coast from 37° to 48° and made a formal claim to the territory within those limits in the name of Elizabeth.

1775.—Heceta, a Spaniard, discovered the inlet which afterwards proved to be the mouth of the Columbia River, and concluded that it was the mouth of a great river or of a passage to another sea.

1779–80.—Captain Cook, sent out by the British Admiralty, coasted northwards from 44°.

1788.—Lieutenant Meares, of the British Navy, entered the bay at the mouth of the river, but did not recognize the river.

1792.—Captain Gray, a citizen of the United States, while on a private trading expedition, passed, for the first time, the bar of the river and sailed up the river for twenty miles. Lieutenant Broughton, later in the same year, ascended the river for a hundred miles from the sea and took possession of the river and the country in the name of His Britannic Majesty.

1805–6.—Lewis and Clarke, on behalf of the United States, explored the river from its source to the Pacific Ocean.

In 1811 the factory of Astoria was established near the mouth of the river by the Pacific Fur Company, a United States Company; but two years later this establishment was sold to the British North-West Company.

In the negotiations of 1818, the Commissioners of the United States did not say that the United States had a perfect right to the country in question, but insisted that their claim was at least good against Great Britain. They based it chiefly upon the discovery and exploration of Gray, the exploration of Lewis and Clarke, and the establishment of the factory of Astoria. The British relied upon former voyages, and principally that of Captain Cook, as giving to Great Britain rights by discovery; and they maintained that the exploration of Lewis

Twiss:  
*Oregon*,  
202.

and Clarke could not be considered to confirm the claim of the United States, because, in the same and subsequent years, if not before, the British North-West Company had established its posts on the river. Those negotiations terminated with a convention providing that the territory in dispute should be open to the subjects of both Powers for ten years.

*Ib.* 286.

When negotiations were resumed, in 1823, the United States extended the scope of their claims to cover the whole of the country west of the Rocky Mountains from 42° to 51° North latitude. They based those claims upon (1) the discovery of Gray and the exploration of Lewis and Clarke, which, they urged, gave them a title to the whole basin of the river, and (2) the cession from Spain in 1819 of all her rights, claims and pretensions to any territories north of 42°. But by the Convention of the Basenial of 1700 between Great Britain and Spain, it had been agreed that the subjects of both Powers might navigate the ocean and make settlements on the coasts at places not already occupied, and Great Britain therefore contended that all the unoccupied parts of the territory were still open to British settlement, and objected that when Gray sailed up the river he was on a merely private trading voyage, from which his country could derive no territorial rights.

*Ib.* 300.

In the negotiations of 1826-7, the United States' claims were based upon (1) the acquisition of Louisiana by cession from France in 1803, which, they urged, gave them a strong claim to the westwardly extension of that province over the contiguous vacant territory, and (2) the several discoveries of the Spanish and American navigators which, though in different hands they would conflict, and separately gave only imperfect claims to each party, might be considered as so many steps in the progress of discovery and, being now in the same hands, supported each other. Great Britain contended that the titles, if combined, destroyed one another.

*Ib.* 164-5.  
Twiss:  
*Law of  
Nations*,  
§ 114.

Both sides agreed that discovery was not by itself sufficient to give a full title. Thus the British Commissioners argued as follows:—

Upon the question how far prior discovery constitutes a legal claim to sovereignty, the law of nations is somewhat vague and undefined. It is, however, admitted by the most approved writers, that mere accidental discovery, unattended by exploration—by formally taking possession in the name of the discoverer's sovereign—by occupation and settlement, more or less permanent—by purchase of the territory, or receiving the Sovereignty from the natives—

constitutes the lowest degree of title; and that it is only in proportion as first discovery is followed by any or all of these acts, that such title is strengthened and confirmed.

All that the United States claimed for discovery was that it gave 'a right to occupy, provided that occupancy took place within a reasonable time, and was ultimately followed by permanent settlement and by the cultivation of the soil.'

When the matter was again discussed, in 1844-5, the United States relied chiefly upon the discoveries of their own citizens, Gray, Lewis and Clarke. By the Treaty of Washington of 1846 they so far obtained what they had claimed, that the boundary line was fixed to pass along the 49th parallel westwardly as far as the middle of the channel between the continent and Vancouver's Island, and thence to be deflected southerly, and pass to the ocean down the middle of Fuca's Strait. British subjects obtained the right of free navigation upon the river from the point at which its northern branch intersects the 49th parallel to the ocean; and all rights that had been acquired by British subjects on the United States side of the new boundary line were to be respected.

Phillimore,  
I. CCL.  
(note).

This case, as has frequently happened in regard to claims based upon discovery, thus ended in a compromise. Gray appears to have been the first actually to enter the river, and in so far as the United States relied upon his exploration and that of Lewis and Clarke, they were opposing an inland voyage to a sighting of the land by Drake and Captain Cook from off the coast. But apart altogether from the fact that Gray was a private citizen engaged in a private undertaking, it is difficult to see how, from the point of view of affording a title to the adjacent territory, a voyage for a few miles up a waterway, which had already been pointed out by Heceta, differed from one along the coast, and it follows from the admissions of both parties that neither kind of voyage is by itself sufficient to ground a full title upon.

See Ch.  
XXVIII.  
below.

A second discovery, as Twiss has pointed out, is a contradiction in terms. The discovery from which, taken by itself, contingent territorial rights are to flow, must, it would seem, be the first detection of the existence of the land over which the rights are claimed.

Discovery  
means the  
first  
detection  
of the  
existence  
of the land.  
Twiss:  
*Oregon*,  
166-7.

### *The Delagoa Bay Arbitration.*

In the Delagoa Bay Arbitration (1875), it was urged, on behalf of Portugal, that according to the ideas that were in

C.-1361  
(1875),  
p. 80.

ib. 177.

force when the Bay was discovered by the Portuguese in the sixteenth century, discovery furnished a legitimate title, and that the Portuguese title ought to be judged according to the principles recognized at that time. Great Britain denied that an occupation made in the sixteenth century could be validly appealed to in the nineteenth, unless it had been followed by continual occupation or recognized dominion; and the Portuguese were not content to base their claim upon discovery alone. In addition to (1) discovery and exploration in the sixteenth century, they pleaded (2) occupation and possession of the Bay during three centuries, (3) the fact that the Bay formed the means of access to territory which was incontestably Portuguese, (4) cessions and recognitions by the native chiefs, and (5) recognition by the European nations, including Great Britain.

ib. 248.

The arbitrator, the French President, supported the British contention to the extent that, although the Portuguese discovery was admitted by the British, he did not base his award, which was in favour of Portugal, upon that alone. The other grounds of the decision were (1) the occupation by Portugal of various points on the Bay, (2) the claim which Portugal had continually made to sovereignty over the Bay and the exclusive right of trading there, and which she had upheld by force of arms against the Dutch and the Austrians, (3) the absence of any expressed objection to these acts on the part of the Dutch and Austrian Governments, (4) the recognition of the whole Bay as Portuguese territory by the Anglo-Portuguese Convention of 1817, (5) the fact that when, in 1822, Captain Owen was sent out to survey the Bay—during which expedition he made with the native chiefs the treaties upon which the British claim was based—the British Government commended him to the good offices of the Portuguese Government, (6) the acknowledgment by the chiefs, directly after the British ships had left, that they were dependent upon Portugal, and (7) the fact that, even if the chiefs had had capacity to make the treaties, those treaties, by their provisions, would have ceased to have any effect.

*Discovery gives only an 'Inchoate Title.'*

C.-3601  
(1898),  
at 198.

It is now clearly settled that discovery, whenever it was made, is not sufficient by itself to confer a full present title to territory. Discovery does, however, when followed by a formal annexation, by what was called in the Venezuelan argument in the British Guiana Boundary Arbitration a 'ceremonial occupa-

tion '—an announcement of the intention to occupy—give an 'inchoate title,' a title which, as Vattel seems to have been the first to point out, 'has been usually respected provided it was soon after followed by a real possession'—a right to *occupy* the territory discovered. But that title is evanescent, and if the occupation is not carried out within a reasonable time, it will lapse, and other nations will be free to annex and occupy the territory.

Field, in his 'International Code,' and Pasquale Fiore suggested that a period of twenty-five years should be allowed after the discovery, within which the requirement of actual possession might be complied with. But attempts to give a definite limit to the period have met with little support, and what is a reasonable time will vary in different cases, and will depend upon such considerations as the difficulty of establishing political control and effecting colonization in the region discovered, the relation of other States to the territory, and the urgency of the need for governmental institutions there. Hall considers that an inchoate title is good as against another occupying State, for such a time as, 'allowing for accidental circumstances or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied.' It may be taken for granted that, as the regions that have not been placed under control have rapidly diminished, and the facilities at the disposal of Governments for carrying out an occupation have been improved, a relatively much shorter time than formerly would now be considered sufficient for taking actual possession.

The principle that discovery confers an inchoate title on the discoverer for a reasonable time was stated to be a correct proposition of law, both by Great Britain and by Venezuela, in the British Guiana Boundary Arbitration. Great Britain maintained that this was the only distinction between the first and second comer, and that otherwise the same rules applied to both. Venezuela appeared to claim further privileges for the discoverer. The first comer, she argued, had the advantage that 'his constructive limits are not curtailed by those of any rival claimant,' that the first comer was entitled, from the date of his settlement, to the widest constructive limits allowed by law under such rules as 'the rule of natural boundaries, of water shed, of middle distance, or any other rule that is rested upon such considerations as safety or convenience, or geographical unity and the like'; and that none of these rules could be used by a

*Vattel*, I. § 207.

C.—9336

(1899), 161.

Twiss:

*Oregon*, 166.

Hall § 32.

Oppenheim,

I. § 223.

Phillimore,

I. § CXXXIX.

Taylor, § 221.

Field, § 76.

23 *R. D. I.* 289.

Bonfils, § 564.

*See Ch.*

VI. *above*

*See the*

*Venezuelan*

*Argument*,

O.—9501

(1899), 229.

Hall, II. II.

*See the*

*British*

*Case*,

C.—9336

(1899), 154,

& *Westlake*,

23 *R. D. I.*

260.

C.—9336

(1899),

149.

C.—9337

(1899),

136.

C.—9499

(1899),

227.

C.—9501

(1899),

720-5.

second comer to curtail the constructive occupation of the first comer.

It appears that, as maintained by Great Britain, such operation as is allowed to the rules for constructive occupation—the limits of which we shall discuss in Chapter XXVII—is the same for a discoverer as for a subsequent occupant. The only advantage gained by the discoverer is the right to a period of grace for making a settlement. During that period, the whole of a territorial unit, discovered and formally annexed, is protected by the rule. But if, after a reasonable lapse of time, no actual possession of the unit is taken by the discoverer, and another State occupies part of that unit, the benefit of such rules of constructive occupation as may be applicable passes completely to the occupying State.

Effect of  
relations  
maintained  
between  
the dis-  
covering  
Power and  
the  
natives.  
Westlake,  
I. VI.  
23 R. D. I.  
262.

Martens-Ferrão in 1890, on behalf of the claims of Portugal to territory in Africa, contended that the rights gained by discovery could be kept alive by maintaining 'rudimentary relations' or 'rudimentary commerce' with the natives of the discovered territory. But although such relations, if they were carried on exclusively by subjects of the discoverer's State, would be a factor to be considered in determining for how long a period the rights acquired by discovery had survived, they would not be sufficient to extend that period indefinitely.

88 S.P. 981

On the other hand, the fact that subjects of other Powers had similar relations with the natives, would also be a factor in the determination. Thus, in 1856, the British Government warned Portugal against extending her occupation on the West Coast of Africa in such a way as to interfere with the rights which British subjects had 'for a long series of years enjoyed of carrying on a free commercial intercourse with the natives of the districts to the north of Angola.' And Prince Bismarck, in 1884, put forward the existence of German commercial establishments on the Caroline Islands as one ground of opposition to the claims of Spain, which were based, in part, upon a sixteenth-century discovery.

See Ch. XIX  
below.

## CHAPTER XIX.

### EFFECTIVE OCCUPATION.

THE Roman law of Occupation was quite unequal to the task of deciding between claims to territory based upon mere discovery. When it came to be recognized that possession was necessary to the perfection of the title, the Roman rules regarding possession could be appealed to. But although these rules, as we shall see in Chapter XXVII, were of some slight assistance when the question to be determined was the size of the area over which the given act or series of acts might be considered to give possession, they tell us nothing with regard to the kind of act by which possession might validly be taken in the process of acquiring sovereignty; and, for a long time after it had been recognized that some such acts were necessary, no agreement was arrived at as to their nature.

Claims were based upon trivial and isolated acts. It was not uncommon for the representatives of a State to set up a pillar, plant a flag, or fix an inscription upon unoccupied territory, and claim thereby to have taken possession on behalf of their State. 'It has always been taken,' said Lord Chancellor Hardwicke in his judgment in *Penn v. Lord Baltimore* (1750), 'that that European country, which has first set up marks of possession, has gained the right, though not formed into a regular colony.' In the negotiations which resulted in the Treaty of the Escorial in 1790, Spain asserted a right of 'Sovereignty, navigation, and exclusive commerce to the continent and islands of the South Sea,' and claimed that 'although she might not have establishments or colonies planted upon the coasts or in the ports in dispute, it did not follow that such coast or port did not belong to her.'

But the sufficiency of such acts was all along denied by jurists: 'Præter animum possessionem desidero, sed qualem-cunque, quæ probet, me nec corpore destitisse possidere,' wrote Bynkershoek in 1702. 'Ce n'est pas sans raison,' said G. F. de

*Dig. XL.*  
1 & 2.  
*Westlake,*  
I. V.  
*Pollock on*  
*Maine's*  
*Ancient*  
*Law, Ch.*  
*VIII, note O.*

Claims to  
territory  
were at  
first based  
upon  
trivial  
acts.  
1 *Vesey's*  
*Reps. at*  
451.

*Twiss:*  
*Oregon, 315.*

But jurists  
did not  
recognise  
the  
sufficiency  
of such  
acts.  
*De dominio*  
*maris, c. 1.*

DeMartens,  
§ 37.

Martens in 1789, 'qu'on a souvent disputé entre les nations, comme entre les philosophes, si des croix, des poteaux, des inscriptions, etc., suffisent pour acquérir ou pour conserver la propriété exclusive d'un pays qu'on ne cultive pas.'

*The essential element in Effective Occupation.*

Some substantial act, then, is necessary to constitute a valid possession. But of what kind?

Not neces-  
sarily the  
physical  
power of  
exclusion.  
Savigny, II.  
§§ 15 & 16.  
C.-1361  
(1876),  
191.

Savigny considered that the essential feature in possession is the physical power of dealing with the subject immediately, and of excluding alien interference with it. This principle was appealed to by Portugal in the Delagoa Bay Arbitration as being applicable to the acquisition of territorial sovereignty, a principle which, it was stated, could be realized in a thousand ways as, in the case in point, by the erection of forts and factories at the principal points on the Bay. In the controversy with Great Britain relating to Mashonaland in 1889, Portugal also referred to the making and building of forts as 'that act which is in law of all acts of possession the most decisivo'; and Lord Salisbury agreed that 'forts maintained in a condition of efficiency are undoubtedly a conclusive testimony that the territory on which they stand is in the military occupation, and under the effective dominion, of the Power to which they belong.'

81 S.P.  
1013.

Id. 1031.

Salmond:  
*Juris-  
prudence*,  
§§ 99 & 104.

It is, however, becoming generally recognized, from the abstract point of view, that the physical power of exclusion is not an essential element in possession, and, so far as territorial sovereignty is concerned, the mere building of forts, as we shall see directly, is not by itself either a sufficient compliance with the condition of effective occupation, nor, in general, a necessary part of it.

Not the use  
and culti-  
vation of  
the soil.

I. § 208.

I. § 209.

On Vattel,  
Note on I.  
§ 208.

By other writers, especially amongst the earlier jurists who considered the subject from the international point of view, stress was laid upon the actual use and cultivation of the soil. Vattel is perhaps the best-known exponent of this view. He laid down that 'The law of nations will not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use. . . . Nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate.' Pinheiro-Ferreira also declared that, in considering whether a certain territory

belongs to a people, the important thing to know is 's'il en profite, s'il possède ou peut posséder, et s'il songe à y appliquer les moyens nécessaires à la production.' Phillimore required a beneficial use and occupation of the territory, as by 'a settlement for the purpose of prosecuting a particular trade, such as a fishery, or for working mines, or pastoral occupations, as well as agriculture.' Twiss also considered that settlement, when it had supervened on discovery, constituted a perfect title; but by settlement he meant the foundation of a colony, not of a mere trading station.

There is now a general agreement that the essential point to look to is not whether there is present sufficient force to repel foreign intrusion, or whether the land is in fact being efficiently exploited, but whether there has been established over it a sufficient governmental control to afford security to life and property there. 'The taking of possession,' says Bluntschli, 'consists in the fact of organizing politically the recently discovered country, joined with the intention of there exercising power in the future.'

On De  
Martens,  
Note on  
I. § 37.  
§§ CXXIX.  
CXXII.  
CXXIX.

§ 120.

*Oregon*,  
180, 206 sq.  
& 314.

The estab-  
lishment of  
efficient  
govern-  
mental in-  
stitutions.  
*Inst. de Dr.*  
*Int.* (1888),  
X. Ann.  
201 sq.  
Bluntschli,  
§ 273.

*Pronouncements and Practice of Governments prior to the  
African Conference of Berlin.*

Queen Elizabeth had protested that the mere fact that the Spaniards had 'arrived here and there, built Cottages, and given names to a River or a Cape' could not 'purchase any propriety'; but it was not until long after that the Governments, which lagged behind the publicists in this respect, accepted the principle that effective possession was necessary to secure a good title to sovereignty. Early in the nineteenth century, however, the Powers began to insist upon this point in their dealings with one another, and the principle was increasingly appealed to as the century advanced.

During the course of the negotiations in 1824 between the United States and Russia with regard to their respective rights in North-west America, the United States' representative advanced the proposition that 'The dominion cannot be acquired but by a real occupation and possession, and an intention ("animus") to establish it is by no means sufficient.'

In the 1826-7 negotiations between Great Britain and the United States, it was maintained on behalf of the United States that 'mere factories, established solely for the purpose of trafficking with the natives, and without any view to cultivation and permanent settlement, cannot of themselves give a

Camden,  
II. 118.

United  
States.  
82 S.P. 264

Twiss:  
*Oregon*, 316.

good title to dominion and absolute sovereignty.' The United States' representatives, however, evidently considered that such factories should serve to strengthen a claim based also upon other grounds for, in the same controversy, they had rested their own claims in part upon the establishment of the factory of Astoria.

See Ch.  
XVIII.  
above.  
I. Moore's  
*Digest*, 575.

In 1852 the United States took exception to the title of Peru to the Lobos (guano) Islands. They contended that the title must depend upon whether the Peruvian Government had exercised such unequivocal rights of absolute sovereignty and ownership over the Islands as to give Peru a right to their exclusive possession, as against the United States and their citizens, by the law of undisputed possession. Peru was, however, able to show a 'long-continued exercise of jurisdiction,' and the United States thereupon withdrew unreservedly all objections to the title.

No. 266.

The same Power informed Hayti in 1872 that, as the latter country was unable to show 'an actual possession and use' of the Island of Nevasa, or 'an extension and exercise of jurisdiction and authority over it,' her pretension of proprietorship of, and sovereignty over, the island was inadmissible.

Great  
Britain.  
C.—1361  
(1875),  
p. 6.

In the Delagoa Bay Arbitration, it was contended on behalf of Great Britain that :—

As far as the Governor of the fortress, in the name of his Sovereign, can and does exercise authority and jurisdiction, so far the country and its inhabitants are under the control and government of the country to which that fortress belongs.

That control and government cease at the moment and at the places where the jurisdiction no longer exists, and the authority no longer is or can be exercised.

Great  
Britain,  
Germany  
and Spain.  
C.—3108  
(1882),  
pp. 70-78.  
73 S.P. 964.

In 1876 the British Government inquired whether the German Government would join with them in intimating to Spain that the state of affairs existing in the Sulu Archipelago must be brought to an end.

By the Treaty of 1851 (wrote the Earl of Derby), Spain claimed to acquire extensive rights over the Sulu Archipelago, and, had the Spanish Government, in virtue of that Treaty, established Settlements there, and made proper provision for the government of the islands, and for the encouragement of foreign trade under reasonable regulations, Her Majesty's Government might perhaps now not be disposed to dispute the sovereignty claimed by Spain.

But this is very far from being the case. . . .

The Spaniards have never, at any time since the Treaty of 1851,

## GOVERNMENTS AND EFFECTIVE OCCUPATION 148

been able to exercise the rights claimed by them, or to obtain any footing in the Sulu Archipelago. All they have done to maintain their right of sovereignty has been to dispatch from time to time expeditions to chastise the inhabitants for alleged acts of piracy, &c., and to issue orders prohibiting foreign trade. . . .

Some of the Spanish expeditions are stated to have landed parties on some of the islands, but merely for the purpose of burning villages, killing the natives, and doing all the damage in their power. No attempt seems to have been made to establish any permanent settlement on shore.

By the Treaty of the 7th March, 1895, Great Britain and Germany recognized the sovereignty of Spain over such parts of the Sulu Archipelago as she had occupied effectively. In all other parts, neither the ships nor the subjects of other Powers, nor their merchandise, were to be subject to any duty or regulation, until Spain had effectively occupied such parts and set up there establishments necessary to commerce. 76 S.P. 58.

The British Government informed the Portuguese Government in 1877 that, with regard to the vast interior of the African continent, respecting which no treaties existed, they did not admit that the idea of sovereignty could be dissociated from that of *bona fide* occupation and *de facto* jurisdiction of a continuous and non-intermittent kind. Great Britain. 75 S.P. 533. F.O. Hand-books No. 112, p. 12, No. 42, p. 46.

At the end of 1888, the German Ambassador said that if Great Britain 'should claim sovereignty over the wide territory, hitherto considered independent, between Orange River and the 18th degree of south latitude, the Imperial Government would, on account of the protection it owes to German trade, esteem it of importance to learn upon what title this claim is based, and what institutions England there possesses which would secure such legal protection for German subjects in their commercial enterprises and justly won acquisitions as would relieve the Empire from the duty of providing itself directly for its subjects in that territory the protection of which they may stand in need.' And Prince Bismarck, in his despatch of the 10th June, 1884, referring also to British claims in South-west Africa, contested the right of any country to exclude others unless prepared to assert its own territorial jurisdiction and sovereignty. Germany. 75 S.P. 533. F.O. Hand-books No. 112, p. 12, No. 42, p. 46. Fitzmaurice: *Life of Granville*, II. 369.

### *The African Conference of Berlin.*

When the African Conference assembled at Berlin in 1884, it was widely recognized, both by statesmen and jurists, that an essential condition of the validity of a title to territorial

C.-4361  
(1886),  
p. 3.

sovereignty was the actual control and administration of the territory. In his speech at the opening of the Conference on November 15th, Prince Bismarck said that, 'Pour qu'une occupation soit considérée comme effective, il est, de plus, à désirer que l'acquéreur manifeste, dans un délai raisonnable, par des institutions positives, la volonté et le pouvoir d'y exercer ses droits et de remplir les devoirs qui en résultent,' and the Conference adopted the substance of this statement as a rule to be applied to the territories with which it was concerned. The Final Act was signed by the plenipotentiaries of Great Britain, Germany, Austria-Hungary, Belgium, Denmark, Spain, the United States, France, Italy, the Netherlands, Portugal, Russia, Sweden and Norway, and Turkey. It was not, however, ratified by the United States.

76 S.P. 4.

The part of the Act with which we are here more particularly concerned is Chapter VI, which comprises Articles 34 and 35 of the Act. It reads as follows :—

C.-4361  
(1886),  
312.  
C.-4739  
(1886).

*Declaration relative to the essential Conditions to be observed in order that new Occupations on the Coasts of the African Continent may be held to be effective.*

#### Article 34.

Any Power which henceforth takes possession of a tract of land on the coasts of the African Continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.

#### Article 35.

The Signatory Powers of the present Act recognize the obligation to insure the establishment ('*l'existence*' in the French text) of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights (*droits acquis*) and, as the case may be, freedom of trade and of transit under the conditions agreed upon.

Article 34 will be dealt with in the Chapter on 'Notification.' Article 35 calls for several observations.

The  
conditions  
essential  
but not  
exhaustive.  
C.-4361  
(1886), 214sq.

The conditions imposed, though they were stated to be 'essential,' were not necessarily exhaustive. They represented, as was pointed out at the Conference, 'the minimum of the obligations which devolve on an occupying State.' And one of the Belgian representatives observed that, as the Conference

was 'not establishing questions of doctrine, but prescriptions of public law, it would be best to keep at first to a few rules as simple and as general as possible, leaving to the wisdom of the Governments the business of completing them by later arrangements if experience should call for them.'

The Declaration was definitely confined to 'new occupations.' This point was several times insisted upon in the course of the Conference, and although the United States Minister inquired 'if existing occupations were not in future to be subject to the same conditions of being entirely under the authority of the Sovereign Power,' no pronouncement was made with regard to such cases.

The Declaration dealt only with new occupations,

Again, the Declaration applied only to acquisitions to be made on the coasts of the African continent. The British Ambassador would have preferred that the rules should apply to the whole of Africa, but this suggestion was not adopted, one objection to it being that so little was then known of the interior of the continent. The Russian plenipotentiary expressly declared that the assent of his Government was strictly limited to the countries to which the attention of the Conference had been drawn; the French plenipotentiary specially mentioned that Madagascar was excluded from the provisions of the Declaration; and the Turkish representative made similar reservations with regard to the possessions of the Sultan to the north and east of the continent.

on the African coasts; See also 'Sergent Malamine' Award, 95 S.P. 141. C.-4361 (1885), 209.

Now the Declaration itself was of course confined to the cases specially mentioned in it, and was, moreover, binding only upon the Signatory Powers in their dealings with one another. But it does not follow that other occupations were not at that time governed by the same rules. A sufficient reason for not including them within the scope of the Declaration was that they did not properly come within the purview of the Conference, as the invitations to the participating Governments had limited this part of the discussion to 'new occupations on the African coasts'; and, further, the statesmen concerned were loath to make any pronouncement which might furnish a pretext 'for disturbing in any manner, or indeed for scrutinizing in any way, the possessions of the Powers.'

but the principles it embodies have a wider application.

C.-4205 (1884).

C.-4361 (1885), 213.

The French representative, it is true, remarked that the 'application to future occupations of Rules which mark a progress in International Law will constitute a sort of propaganda, the example of which may induce certain Governments to extend voluntarily to their ancient possessions the Rules estab-

C.-4206  
(1884), 18.  
C.-4284  
(1885),  
3 & 4.  
C. 4361  
(1885), 12.

lished for future possessions.' But, as we have already seen, Article 85 merely expressed in a formal manner a rule which had previously obtained very considerable acceptance. This was recognized by the British representative. In the preliminary correspondence respecting the Conference, there had been an understanding between England and Germany that, with regard to the question of future occupations, all that would be required would be the practical application of 'the principles unanimously laid down by the jurists and Judges of all lands, including England.' A declaration to the same effect was made by the British representative at the opening meeting of the Conference; and, in his report to the British Foreign Minister after the Conference, he stated that this was all that had been done. 'No attempt,' he said, 'is made by the Conference to interfere with existing maxims of International Law; dangerous definitions have been avoided, and international duties on the African coasts remain such as they have been hitherto understood.'

Salomon,  
p. 329.  
Jéze, pp.  
266-7.

The French Government also recognized that the Berlin Act merely applied to the African coasts the rule which France had all along observed. This fact was brought out by the French Foreign Minister in the instructions which he sent to the French Ambassador at Berlin at the beginning of 1884. And the Commission charged with the examination of the *projet de loi* for giving effect to the provisions of the Berlin Act reported that the obligation to ensure the existence of a sufficient authority would impose no new duty upon France.

Changes  
made in  
the draft of  
Article 85.

The draft of Article 85 of the Berlin Act, as submitted to the Conference by the German Government, underwent several changes before it was finally adopted by the Conference, and a comparison of the forms it took at various stages brings out several important points. The German draft read as follows:

C.-4361  
(1885),  
194.

The said Powers acknowledge the obligation to establish and to maintain in the territories or places occupied or taken under their protection a jurisdiction sufficient to secure the maintenance of peace, respect for rights acquired, and, where necessary, respect for the conditions under which liberty of commerce and of transit shall have been guaranteed.

Existing  
institutions  
may be  
utilized.

(1) In the first place, we note that the obligation 'to establish and to maintain' a sufficient jurisdiction is altered, in the French text of the Final Act, to the obligation 'd'assurer l'existence' of a sufficient authority, although in the English translation the word 'establishment' is still used. This altera-

tion was made at the instance of the French Ambassador, who pointed out that the words at first proposed 'would lead to the supposition that at the time of a new occupation there would always be organic innovations to be introduced for the application of justice, whilst, perhaps, in certain regions the existing institutions would suffice and be merely preserved.'

*ib.* 215.

(2) The obligation to secure the maintenance of peace was omitted on the suggestion of one of the Belgian representatives, and the proposal to replace it by a clause declaring the necessity of 'maintaining order' was also not adopted. 'Sometimes,' remarked the Belgian representative, 'in countries only newly occupied, and often at a distance, peace might find itself exposed to trials which authority might not be always successful in removing. Would troubles,' he asked, 'unrepressed at the moment justify third parties in calling in question the rights of the occupant?' And he added that 'a sufficient guarantee exists in the necessity of causing acquired rights to be respected, comprising, as they do, persons and things.'

An authority which can maintain peace is necessary.  
*ib.* 216.

It may be observed that the obligation proposed in the draft was not that of actually ensuring permanent peace, but of providing a sufficient authority for the maintenance of peace. So long as there was an authority which was reasonably sufficient for this purpose, the rights of the acquiring Power could be in no danger from merely temporary outbursts of lawlessness; while those rights would be protected in the early stages of the occupation by the rule that a reasonable delay is allowed for the fulfilment of the conditions imposed. It is difficult, however, to see how existing rights could be protected without the assistance of an authority sufficient to ensure the maintenance of peace, so that, as seems to have been admitted, the duty was still implied by the Article as finally worded.

*ib.* 10, 216.

(3) The Committee proposed that the rights to be protected should be described as those 'acquired by private individuals,' considering that it was a question of civil rights, and that these 'must be protected at whatever period they may have been acquired, before as well as after the occupation.' Although this interpretation was accepted, it was not considered necessary to include the proposed qualification in the declaration. It was, however, explained by the President that the 'acquired rights' referred to 'comprised all the acquired rights in existence at the time of a new occupation, whether these rights belonged to private individuals or to Governments.'

All private rights are to be protected.  
*ib.* 216.

*ib.* 208.

*Protectorates.*

Article 35  
as worded  
did not  
apply to  
Protector-  
ates ;  
G.-4284  
(1885), p. 3.

Article 35 as originally drafted applied equally to the territories which a Power should take under its protection and to those which it should occupy. The reference to protectorates was, however, struck out on the suggestion of the British Ambassador, and the result was that, while by Article 34 notification was necessary in the case of a protectorate as well as that of an actual 'taking of possession,' the provisions of Article 35 as to the establishment of a sufficient authority did not, in terms, apply to protectorates.

but should  
be inter-  
preted to  
cover  
them.  
See Ch.  
XXIII.  
below.

The establishment of a European protectorate over the territory of an African chief, however, came afterwards to be recognized as being merely a step towards the annexation of the territory by the protecting Power. So far as third States are concerned, it amounts therefore to an 'occupation' within the meaning of Article 35, and should carry with it the obligation imposed by that Article. Any other interpretation would enable a Power, merely by calling its acquisition a protectorate, to extend indefinitely the 'reasonable delay' allowed for rendering an occupation effective.

This interpretation has been adopted by the British Government. The Africa Order in Council, 1892, recited that 'by the General Act of the Conference of Berlin signed in 1885, the several Powers who were parties thereto declared, with respect to occupations in Africa by any of the Signatory Powers, that the establishment of authority in protected territories was an obligation resting upon the respective Protecting Powers.' The Order accordingly provided that, where Her Majesty had declared any territory or place within the limits of "The African Order in Council, 1889" (which included the whole of Africa) to be a Protectorate of Her Majesty, subjects of the Signatory Powers should be justiciable by the British Courts within the Protectorate, and that the consent of such subjects to the exercise of jurisdiction should no longer be necessary.

23 R. D. I.,  
284.

Westlake at first considered that the Conference had done wisely in excluding protectorates from the requirement of effective occupation. But later, when the true nature of colonial protectorates had become apparent, he maintained that the principle of the Article applied to them, on the general ground that a Power claiming to exclude other Powers from a region open to the enterprise of their subjects must itself provide for

Int. Law  
I. Ch. VI.

the safeguard and regulation of that enterprise. Hall expressed the same opinion; and it has met with general acceptance.

Quite recently, however, the Spanish Government, in connection with their evacuation of part of their zone in Morocco, appear to have attempted to revive the distinction between 'possessions' and 'protectorates' in this respect, by putting forward the claim that, by virtue of Article 35 of the Berlin Act, they are relieved from the obligation of maintaining effective control over the whole of the zone included within the Spanish protectorate. But such a claim does not appear to be likely to be acquiesced in by the other European Powers concerned.

*Foreign Powers, etc.*  
§§ 96 & 94.  
*The Times*,  
11 Nov.,  
1924, pp.  
13 & 14.

### *The Convention of St. Germain.*

In the Convention of St. Germain-en-Laye of September 1919 (which replaces the Berlin Act as between such of the Signatory Powers as have ratified or may ratify it), the effective occupation of their African possessions is undertaken by the Powers concerned without limitation to any part of the Continent or to annexed as distinguished from protected territory. The undertaking constitutes Article 10 of the Convention, which reads as follows:—

*Cmd. 477*  
(1919).

The Signatory Powers recognise the obligation to maintain in the regions subject to their jurisdiction an authority and police forces sufficient to ensure protection of persons and of property and, if necessary, freedom of trade and of transit.

### *The Case of the Caroline and Palaos Islands.*

The emphasis which International Law lays upon the doctrine of effective occupation, apart from the requirements of the Berlin Act, was recognized by Pope Leo XIII in his recommendation of October 1885, as mediator between Germany and Spain in the matter of the Caroline and Palaos Islands.

*Calvo*,  
§§ 1692-8.  
*Salomon*,  
§ 105 *sq.*  
*Jéze*, 258 *sq.*

Spain claimed these Islands by right of discovery in the sixteenth century, and in virtue of the despatch of religious missions and other acts extending over three centuries.

Germany took possession of the Island of Yap in August 1884—according to Spain, immediately after Spanish officers had hoisted the Spanish flag there. Prince Bismarck justified the action of Germany on several grounds. There was, he urged, no material indication upon the islands that any nation exercised rights of sovereignty there. He pointed out that, in 1875, both Germany and Great Britain had expressly informed

Spain that they did not recognize any Spanish rights of sovereignty over the Islands; and that the Imperial Government had received no official notification of any taking of effective possession of them as, he suggested, was required in accordance with custom and with the principles agreed upon at the Berlin Conference. On the other hand, he said that German commercial establishments existed on the Islands, and that their founders had applied to the Imperial Government to place the region under its protection.

Martens,  
2nd Series,  
12, p. 292.

The Pope, although he was not able to say that what Spain had done amounted to effective occupation in the modern sense, made proposals which were favourable to her, chiefly in consideration of the fact that the Spanish discovery, and the series of acts accomplished by the Spanish Government for the good of the natives, had established in the Spanish Government and nation the conviction that they had a right to the sovereignty. He suggested that Spain and Germany should enter into an agreement on the lines of that made earlier in the same year between Great Britain, Germany and Spain with reference to the Sulu Archipelago, and that the agreement should include the following points :—

See p. 143  
above.

(1) The affirmation of Spanish sovereignty over the Islands.

(2) 'Le Gouvernement Espagnol pour rendre effective la souveraineté, s'engage à établir le plus tôt possible dans cet Archipel une administration régulière avec une force suffisante pour sauvegarder l'ordre et les droits acquis.'

In addition, Germany was to be given liberty of commerce, of navigation, of fishing, of founding establishments in the Islands, and of forming a naval station and coaling depot there.

ib. p. 296.

These recommendations were given effect to by a Treaty concluded between the two Powers in December 1885. The Treaty provided that Spain was to have the right of levying duties upon merchandise, and enforcing sanitary or other regulations, only in the parts effectively occupied. It continued : 'Mais de son côté l'Espagne s'engage à y entretenir les établissements et les employés nécessaires pour les besoins du commerce et pour l'application des dits règlements.' (In 1899 these Islands were sold to Germany.)

F.O. Hand-  
book, No.  
146, p. 19.

This case, both on account of the geographical position of the Archipelago and the antiquity of the Spanish connection with it, did not come within the Berlin Act. The mediator would not go so far as to say that Spain, by her failure to occupy the Islands effectively, had lost the rights which her discovery

and her various acts, spread over so long a period, for the good of the natives, might have given her. On the other hand, he subscribed to the proposition that an occupation must be rendered effective to remain valid to the following extent: he suggested that the recognition of Spanish sovereignty by Germany should be coupled with an express undertaking on the part of Spain to render that sovereignty effective by setting up an administration sufficient for the preservation of order and the protection of acquired rights—a suggestion which was accepted and carried out by both Powers.

*Great Britain and Portugal in Central Africa.*

During the controversy between Great Britain and Portugal in 1887 and the following years, with reference to the region claimed by Portugal in Central Africa between her possessions of Angola and Mozambique, the Portuguese Government took up the position that the Berlin Conference had designedly rejected the principle that the requirement for effective occupation applied throughout Africa, and maintained that 'with respect to territories in the interior of Africa, effective occupation was not a *sine quâ non* of possession or political dominion or of demarcation of respective spheres of influence.'

Lord Salisbury contended that it had 'been admitted in principle by all the parties to the Act of Berlin that a claim of sovereignty in Africa can only be maintained by real occupation of the territory claimed'; and he required an occupation in sufficient strength 'to maintain order, protect foreigners, and control the natives.' 'The fact,' he wrote in another dispatch, 'that the Act of the Berlin Conference laid down conditions in Articles XXXIV and XXXV in relation to new occupations on the coasts of Africa did not in any way affect the well-established principles of International Law in regard to the occupation of lands in the interior.'

In 1889 Portugal still held to the position that she had taken up at the commencement of the discussion. Were the doctrine of effective occupation to apply to the interior of Africa, she argued, Germany, England and the Congo Free State would not be able to show a good title to some of their possessions in that region; and the wide recognition accorded to spheres of influence was appealed to as proving 'that effectual occupation, as meaning the permanent establishment of authorities, cannot be held to constitute a condition essential to the recognition of possession by other nations.'

*See also*  
Ch. XXIV.  
*below.*  
F.O. Hand-  
book, No.  
86, pp. 13 *sq.*  
79 S.P.  
1063 *sq.*

51 S.P.  
1017.

C.-4361  
(1885),  
p. 10.

81 S.P.  
1031-2.

But in so arguing, Portugal had left out of account that part of the doctrine which allows to the occupying State what Prince Bismarck, in his opening speech to the Conference, called 'a reasonable delay' within which it may provide the institutions which effective occupation entails. And this was well pointed out by Lord Salisbury in his reply. 'It is not,' he said, 'required by International Law that the whole extent of a country occupied by a civilized Power should be reclaimed from barbarism at once: time is necessary for the full completion of a process which depends upon the gradual increase of wealth and population; but, on the other hand, no paper annexation of territory can pretend to any validity as a bar to the enterprise of other nations if it has never through vast periods of time been accompanied by any indication of an intention to make the occupation a reality, and has been suffered to be ineffective and unused for centuries.'

*British Guiana and Venezuela Boundary Arbitration.*

Questions bearing upon effective occupation loomed very large in the Arbitration which took place in 1899 with reference to the boundary between British Guiana and Venezuela. On account of its importance, this case demands more than a passing notice.

C.-7926,  
7973, 8012,  
8108 & 8,  
8194 & 5  
(1898).  
C.-9338 to  
8, 9499 to  
9501 & 9533  
(1899).  
87 S.P.  
1061 sq.  
88 S.P.  
1242 sq.

The definition of the boundary had been a matter of discussion between Great Britain and Venezuela since 1841; and several different boundary lines had been suggested by one side and rejected by the other. The Government of the United States of America had, on several occasions, offered their good offices and their services as Arbitrator. In 1895 they interposed with the claim that, under the Monroe Doctrine, they could not be indifferent to any attempt on the part of Great Britain to extend her territory in America. Shortly afterwards, a Treaty of Arbitration was entered into between Great Britain and Venezuela, the United States taking charge of the Venezuelan case.

O.-5439  
(1897).

By this Treaty, which was dated 2nd February, 1897, an Arbitral Tribunal was appointed to determine the boundary line. Article III of that Treaty read as follows:—

The Tribunal shall investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by, the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana, and shall determine the boundary-line between the Colony of British Guiana and the United States of Venezuela.

By Article IV it was provided that the Arbitrators should be governed by certain Rules which were 'agreed upon by the High Contracting Parties as Rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to be applicable to the case.' These Rules were the following:—

(a) Adverse holding or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

(b) The Arbitrators may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law, and on any principles of international law which the Arbitrators may deem to be applicable to the case, and which are not in contravention of the foregoing rule.

(c) In determining the boundary-line, if territory of one Party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other Party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require.

On behalf of each of the High Parties, a printed 'Case,' 'Counter-case,' and 'Argument' were successively presented to the Arbitrators. In these documents, facts tending to show settlement or control in favour of one or other of the Parties from the time of the discovery of the region by Columbus were discussed in considerable detail, and the law affecting the various points was elaborately argued.

Venezuela claimed as the successor to Spain, from whom she had revolted in 1810, although her independence was not recognized by Spain until 1845. Great Britain's title rested upon the Dutch cession to her of 1814. The arguments in the case turned largely upon questions as to how far the occupation and control of the Spaniards had extended in a south-easterly direction from Venezuela, and how far the Dutch had settled and exercised control northwards along the coast and westwardly inland.

Venezuela maintained that the boundary line should run along the Essequibo River. Great Britain contended that it should follow a course which had been determined by Sir Robert Schomburgk, who, 'from actual exploration and

information obtained from the Indians, as well as from the evidence of local remains and local traditions,' had 'ascertained the limits of Dutch possession and the zone from which all trace of Spanish influence was absent.' This line was also based upon the physical features of the country.

On behalf of Venezuela it was urged that the region had been discovered by Columbus and explored by Spain, who had taken formal possession of Guiana as a whole in the sixteenth century: that Guiana was a geographical unit to which the Spanish title had been perfected by 'a first and timely settlement of a part for the whole,' and also that certain parts of the country formed smaller geographical and political units, to which Venezuela had acquired a title in the same way: that, while from 1625 the Dutch had had a footing in Guiana, the Dutch possessions rested upon Conquest; and that, by the Treaty of Munster of 1648, under which the independence of the Netherlands was recognized by Spain, those possessions were limited to the territories of which the Dutch were then in actual possession: that the Dutch possessions at that time did not extend westwardly beyond the Essequibo River; and that, by the Treaty of Munster, they were debarred from extending them subsequently.

Great Britain refused to admit that the Dutch were prevented from extending their territories beyond their actual possessions at the date of the Treaty of Munster. The Treaty, she maintained, merely confirmed to both of the Parties to it the regions of which they were then in occupation, and left each free to take possession of territory that had been previously occupied by neither of them. Nor would she admit the broad claims which Venezuela based upon constructive occupation; nor that the regions into which Venezuela had subdivided Guiana were geographical units. She contended that, at the date of the Treaty of Munster, the Dutch had settlements in various parts of the country, while the nearest Spanish settlement was at San Thomé on the Orinoco River, far to the west of the Schomburgk line.

Each of the Parties alleged that it, or its predecessor in title, had had political control of all the territory between the Essequibo River and the Schomburgk line subsequently to the Treaty of Munster. But while little could be said to prove the exercise of sovereignty in the disputed territory by Spain and Venezuela—except, perhaps, near the mouth of the Orinoco—Great Britain was able to point to a considerable amount of

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evidence in favour of Dutch and subsequently British possession and political action.

According to Great Britain, the Dutch (through the Dutch West India Company which was formed in 1621), and later on the British, had stationed 'Postholders' throughout the territory in dispute to carry out their control. They had explored and developed the country; regulated the trade with the natives, the cutting of timber, and, latterly, the gold-mining; and had issued passports. They had entered into contracts, leagues, and alliances with the Indians, who acknowledged their sovereignty within the disputed territory; and they had employed the Indians for military and other services. Venezuela rejoined that such acts as these 'were in no sense acts of political control,' and that the Indians were incompetent to confer a title to sovereignty.

Between 1724 and 1788, twenty-eight Capuchin Missions, each with its quota of soldiers, and invested with the necessary political powers, had been established by the Spaniards over a considerable area in the basin of the Orinoco. A large number of natives had been gathered into these Mission villages which, in 1799, had a total population of nearly 16,000. Venezuela alleged that these Missions had penetrated and settled over a considerable region to the east of the Schomburgk line. Great Britain admitted the propriety of modifying what she considered to be the natural boundary of the territory she claimed, so as to give to Venezuela the territory occupied by the Missions. But she maintained that none of them had extended so far east as to reach the Schomburgk line; and that the influence of the Spaniards was not pushed beyond the region actually occupied by the Missions.

Venezuela further maintained that, in view of the reference to the Arbitrators in Article III of the Arbitration Treaty, the present boundary must depend upon Dutch and Spanish rights at the time of the acquisition of the Colony by Great Britain; and that, at all events, on account of the fifty years' rule (Rule (a) above), the expansion of British occupation subsequent to 1847 could have no effect upon the determination of the boundary line. In order that a locality should be regarded as actually settled so as to 'constitute adverse holding' under that Rule, she demanded that the 'inhabitants, in greater or less numbers, should have adopted that locality as a fixed place of abode, and should have established there their homes and occupations with a certain degree of permanence; and that

C.-8106  
(1896),  
355.

they should be under a recognized and actual political control.' 'Political control' was defined as 'the exercise of sovereignty over a territory, through political or governmental administration.'

Great Britain refused to allow that any particular spot not occupied by Holland or Great Britain *ipso facto* belonged to Spain or Venezuela. The fifty years' rule, she contended, did not apply to territory which was vacant when she took possession of it; and she maintained her right to any such territory however recent her taking of possession might have been.

The points upon which the delimitation of the frontier should mainly turn, Great Britain submitted, were:

(1) The extent of effective occupation and political control on each side.

(2) The natural features of the country. She laid down that:

C.-9338  
(1899),  
149.

Effective occupation means the use and enjoyment of the resources of the country and the general control of its inhabitants, under the protection and by the authority of a Government claiming and exercising jurisdiction in that behalf.

C.-9501  
(1899),  
196.

Venezuela would not agree that the discoverer's title is not perfected until he has 'brought into use the resources of the whole territory discovered, and has subjected its savage inhabitants to his control.' She contended that political control without actual settlement was sufficient to establish the discoverer's title; and that 'it is the law and the international usage of the 16th and 17th centuries, and not the stricter modern view of occupation, expressed in the Berlin Convention of 1884, that must govern in this case.'

ib. 232.  
See hereon  
the Norway-  
Sweden  
Frontier  
Arbitral  
Award.  
102 S.P.  
944.  
C.-9533  
(1899).  
92 S.P. 160.

The Award of the Arbitrators is dated 8rd October, 1899. They gave no reasons for their decision, but they drew the boundary line in such a way as to give to each Party the territory of which it had been able to show the more effective control, while allowing due recognition to the natural features of the country. For the greater part of its length, the boundary followed the Schomburgk line. But that line was varied in two respects. At its northern end, it was moved so as to give Venezuela control over the mouths of the Orinoco, the exploration, settlement, and effective defence of which river by Spain had been admitted by Great Britain; while, lower down, the Schomburgk line was shifted eastwards for part of its course along the Cuyuni River, in the neighbourhood of the region

where the Venezuelan case had alleged the existence of Spanish Mission stations, and near where a modern Venezuelan post had been established.

*British Guiana and Brazil Boundary Arbitration.*

In his Decision of the 6th June, 1904, as Arbitrator between Great Britain and Brazil, the King of Italy laid down the condition of effective occupation as one of the rules that should have governed the determination of the frontier separating British Guiana and Brazil. Although he was unable to obtain any definite result when he applied the rule to the facts at his disposal, that does not render less significant his citation of the rule in regard to a dispute about territory quite outside the region dealt with in the Berlin Act, and involving facts dating from before the acquisition of British Guiana from the Dutch in 1814. He held in this case :

CA. 2166  
(1904).  
89 S.P. 930.

That the occupation cannot be held to be carried out except by effective, uninterrupted and permanent possession being taken in the name of the State, and that a simple affirmation of rights of sovereignty or a manifest intention to render the occupation effective cannot suffice.

*The cases of Recent and of Older Acquisitions.*

In view of the adoption by Great Britain, Germany, France, and the United States, both before and after the Berlin Conference, of the principle of effective occupation, and of the fact that, during recent years, no colonial Power appears to have taken exception to the applicability of the rule to new occupations, it seems to be justifiable to say that all recent acquisitions of territory, whether on the coasts of Africa or not, are subject to it.

With regard to older cases, it has been suggested that the position is not so clear. It is possible that, as the case of the Caroline and Palao Islands would seem to indicate, the rule would not be applied to them with the same strictness. But it follows from the British Guiana boundary cases that the actual exercise of sovereign powers would have to be shown ; and it would appear that a State could legitimately be required to show the existence of an authority sufficient for the protection of life and property in any region from which it claimed to exclude the political action of others.

See Heimb-  
urger,  
p. 140.

*The presence of an extraordinary amount of crime is evidence against Effective Occupation.*

Id. 8878  
(1913),  
pp. 7 & 8.

See  
Ch. VIII.  
above.  
29 Times  
Low Re-  
ports, 384.

An erroneous notion as to what is required for effective occupation appears to have been entertained by the Peruvian Government in 1912. That Government, according to the Peruvian Consul-General, had not protested earlier against the crimes known to exist in the Putumayo for the reason that 'it could be proved that they were committed almost exclusively by Colombians, and that this very fact would support a claim of effective occupation by Colombia, which would go far to sustain that country's pretensions to possession.' It would seem, on the contrary, that the very fact of the absence from the Putumayo of an authority sufficient to protect the natives from violence, and particularly from such crimes as were revealed by the report of the British Consul-General and by the winding-up proceedings in the English Court in connection with the Peruvian Amazon Company, Limited, was in itself sufficient to show that no effective occupation had taken place.

*Uninhabited lands unsuitable for settlement.*

See Ch. II.  
above.

The case of uninhabited lands which are not suitable for settlement requires special consideration. It has been suggested, for example, that the North Polar regions have a 'high strategic value,' and that Wrangel Island and other islands in the Arctic Ocean might contain minerals, or be of use as aircraft bases, or for purposes of wireless telegraphy, or in connection with the Arctic fisheries.

In such cases, it would seem that an occupation would be rendered effective by the establishment of any organization (however rudimentary) or of any system of control, which, having regard to the conditions under which the area appropriated was being used or was likely to be used, was reasonably sufficient to maintain order among such persons as might resort there.

Id.

Again, small uninhabited islands are sometimes occupied for some special or temporary purpose, such as the collection of phosphate or guano, or the exploitation of the fishery. Here also no elaborate administrative machinery is called for, and the presence of an official may be all that is reasonably required to ensure that order is maintained among the workpeople and others employed there.

*Summary.*

Thus the rule which to-day is generally accepted, and in favour of which several arbitral decisions, and the acts of a considerable number of States, can be quoted, even with regard to cases outside the scope of the Berlin Act, is that a valid title to backward territory—at all events to newly acquired territory, and probably also to older acquisitions—depends upon the existence throughout the region, within a reasonable time after the first formal taking of possession or the announcement of a claim to exclusive control, of an administration sufficient for the protection of life and property.

What is sufficient will depend upon all the circumstances. If the territory contains a large population, or is one to which a good many traders resort, elaborate administrative machinery may be necessary. If, on the other hand, it is remote, or small, or incapable of accommodating more than a small or transitory population, a rudimentary administrative organization may be all that is required; while in the case of small islands used merely for the purpose of a particular business, such as the catching and curing of fish or the collecting of guano, the presence of an official or two may be sufficient.

What is sufficient depends upon all the circumstances.  
88 S.P. 1288.  
I. Moore's *Digest*, 280.  
Hall: *Foreign Powers*, etc., § 96.  
Pollock on *Maine's Ancient Law*, Ch. VIII, note C.

## CHAPTER XX.

### CONQUEST.

Vattel III.  
XIII.

CONQUEST is a mode of acquiring territory which has established itself throughout history, and it is at present recognized by International Law without regard to the justice or injustice of any particular acquisition. A conquest, however, which could not be justified, for example, on the ground that it represented just retribution for wrong committed, or that it was a gain to humanity, would tend to bring upon its perpetrator the censure of public opinion.

Hall III.  
IX. § 204.

In re  
Southern  
Rhodesia,  
1919 A. C.  
at p. 221.  
Grotes, III.  
VI. IV. (I).

Conquest, as a title to territory, assumes the absence of any formal transfer on the part of the previous sovereign, whether that sovereign be an advanced State or a native political society, and requires (1) the taking possession of the territory by force, coupled with (2) the intention and (3) the ability to hold the territory as its sovereign. 'Non sufficit qualiscunque possessio, sed firma requiritur.'

#### *When is a Conquest complete ?*

Oppenheim  
II., § 264 sq.

Where a belligerent has completely destroyed his enemy's forces, it is open to him to annex the whole or part of the enemy territory, and his title will be completed when he signifies his intention to do so and effectively occupies the territory annexed.

Similar considerations apply in respect of any part of the territory which has been swept clear of the forces of the previous sovereign, except that if those forces remained in the field, and were capable of a serious attempt to regain the lost territory, its annexation would not be justified. The victorious sovereign usually demands the cession of such parts of his enemy's territory as he desires to annex, as part of the terms of peace ; but if the war is terminated without such a cession, the territory actually in the occupation of the invading forces may be annexed by the occupant on the principle of *uti possidetis*.

The intention to appropriate and retain the territory is usually evidenced by a proclamation. But such a formal mode of annexation is not indispensable, and other acts, such as a disposition of the public lands in the conquered territories, are equally operative. Nor is failure to annex forthwith necessarily a renunciation of all right to annex at any time.

*See e.g.,*  
97 S.P. 988.  
*In re*  
*Southern*  
*Rhodesia,*  
1919 A.C.  
at 240.  
*Id.*

Whether or no possession has been effectively taken and is likely to be maintained are matters of fact which other States will have to consider before deciding to recognize the conquest, taking into account such questions as the conclusion or non-conclusion of a treaty of peace, the length of time during which undisturbed possession has lasted, and the possibility or probability of the defeated sovereign retrieving his position in the territory.

The British Proclamations of the 24th May and the 1st September, 1900, respectively, annexing the Orange Free State and the Transvaal, were issued while the remnants of the Boer armies were still engaged in guerilla warfare against the British forces. In these circumstances, as Westlake points out, the annexation was proclaimed before the conquest had actually been completed, although the main Boer armies had been effectively beaten, and the question of the surrender of the remaining bands was only a matter of time.

Great  
Britain  
in the  
Transvaal  
and Orange  
Free State.  
93 S.P. 547 *eq.*  
& 1081 *eq.*  
Westlake, I. IV.

In a case of this kind, where a war has degenerated into sporadic action on the part of flying bands, it would clearly be unreasonable to require that every band, however small, should be broken up before the conquest could be said to be legally completed; and the exact point at which resistance has become so small as to be negligible must be decided as a question of fact in any given case. But where guerilla warfare is continued on any extensive scale as a continuation of the main operations of the war, the issue of an annexation proclamation is, strictly speaking, premature, and could not in fairness be regarded as turning the local forces still resisting, and their helpers, into rebels against the annexing sovereign.

Westlake,  
I. IV.

### *Italy in Libya.*

The Italian Decree of the 5th November, 1911, by which Tripolitania and Cyrenaica were 'placed under the full and complete sovereignty of the kingdom of Italy,' was issued while the interior of the country was still unconquered and, as subsequent events proved, the Italian hold even on the coastal towns was not fully assured.

F.O. Hand-  
book No.  
127, pp. 18  
*eq.* & 68 *eq.*  
106 S.P.  
1096 *eq.*

The Italian circular justifying the annexation at the time of the Decree set out the principal considerations as follows :

The occupation of the principal towns of Tripolitania and Cyrenaica, the constant successes of our arms, the overwhelming forces which we have already assembled there and the reinforcements which we are preparing to send have rendered ineffectual and vain all further resistance on the part of Turkey; moreover in order to put an end to a useless shedding of blood, it is urgently necessary to dispel any uncertainty in the minds of the inhabitants of those regions. It is for this reason that by the Royal Decree, dated to-day, Tripolitania and Cyrenaica have been definitely and irrevocably placed under the full and complete sovereignty of the kingdom of Italy. Any other less radical solution, which might have left to the Sultan even the shadow of a nominal sovereignty over these provinces, would have been a permanent cause of conflicts between Italy and Turkey.

The Turkish Government were, however, by no means prepared to acquiesce in the annexation, or in the reasons by which the Italian Government had sought to justify it. On the 8th November, 1911, they issued a reply, in which they said :

The Sublime Porte protests in the most energetic fashion against this proclamation, which it considers to be null and void both in law and in fact. Such an act is effectively null, because it is inconsistent with the most elementary principles of international law. It is equally so, because Turkey and Italy are still in open war with each other, and because the Ottoman Government means to conserve and defend by arms its own imprescriptible and inalienable rights of sovereignty over these two provinces.

The war dragged on until October of the following year when, owing partly to complications in Europe, the Turks agreed to sign the Peace of Lausanne. But it is difficult to say that, even then, they formally recognized the Italian annexation.

The 'Agreement preliminary to Peace,' which was signed on the 15th October, 1912, recited the equal desire of the two States to put an end to the state of war, and also 'the difficulty of arriving at a settlement owing to the impossibility for Italy of modifying the law of February 25, 1912 [confirming the annexation Decree of the previous November], which proclaimed her sovereignty over Tripolitania and Cyrenaica, and for the Ottoman Empire of formally recognizing this sovereignty.' In view of these difficulties, the following procedure was agreed upon :

The Turkish Government bound itself to issue an Imperial Firman addressed to the populations of Tripolitania and Cyrenaica in terms which were set out in an Annex to the Agreement. In this Firman the Sultan informed the inhabitants of the two provinces that, as his Government found itself unable to give them the help necessary for the defence of their country, and availing himself of his 'sovereign rights,' he conceded to them 'full and complete autonomy.' He further nominated a representative who was to be charged with the protection of Ottoman interests in the country, and reserved to himself the nomination of the Cadi and his subordinates for the administration of the Sacred Law. In the Agreement itself, however, it was provided that the representative of the Sultan and the religious chiefs were to be previously agreed to by the Italian Government.

The Italian Government, on its part, bound itself to issue a Royal Decree in a form which was also annexed to the Agreement. This Decree recited the Italian Law by which, as it stated, the provinces had been 'subjected to the full and complete sovereignty of the kingdom of Italy,' it granted an amnesty, and it promised the inhabitants 'the fullest liberty in the practice of the Mussulman Religion,' including the liberty to pronounce the name of the Sultan as Khalifa in the public prayers.

In the 'Treaty of Peace,' which was signed three days after the 'Preliminary Agreement,' the Ottoman Government agreed to give immediate orders of recall to its officers, troops, and civilian officials, in return for a similar undertaking on the part of the Italians with regard to the occupied islands in the Aegean Sea.

In Tripolitania, the Turkish Army was withdrawn, most of the native chiefs made submission, and the Italian position in the province seems to have become reasonably assured. In Cyrenaica, however, the Turks and the Senussi continued to resist, and, when Italy entered the Great War, made determined attempts to recover both provinces, and succeeded in regaining possession of the interior of Tripolitania.

In these circumstances, not only does it appear that the annexation Decree was issued before the conquest of either province had been completed, but it is difficult to say that the conquest of Cyrenaica had been really effected at the time Italy entered the Great War. In the Treaty of Peace which was signed at Lausanne on the 24th July, 1923, Turkey recognized

Art. 22-9.  
Cmd. 1929  
(1923).

the full sovereignty of Italy over the provinces by agreeing to 'the definite abolition of all rights and privileges whatsoever which she enjoyed in Libya under the Treaty of Lausanne of the 18th October, 1912, and the instruments connected therewith,' without prejudice, however, to the spiritual attributions of the Moslem religious authorities.

### *Extent of the Conquered Area.*

The question whether the conquest of the whole of a country can be regarded as completed by the military occupation of the chief towns, or of the seat of the Government, or of the greater part of the territory, turns upon whether there remain in the unoccupied portion any considerable forces of the original sovereign capable of, and prepared to offer, effective resistance. So long as the occupying army is kept out of any portion of the territory by the local forces, that portion clearly has not been conquered.

But where the invading army has defeated the local forces to such an extent that no effective resistance remains to the military occupation of other parts of the country, the invading sovereign is at liberty to annex and occupy those parts, and any attempt by a third State to seize such parts before the conqueror had actually occupied them would be a violation of his rights.

But see  
Westlake  
I. IV.

The Sudan.

Cmd. 9054  
(1898),  
p. 6.

Thus it was claimed by the British Government that, by the destruction of the Khalifa's army by the Anglo-Egyptian forces at Omdurman, 'all the territories which were subject to the Khalifa passed by right of conquest to the British and Egyptian Governments,' and that the occupation which Major Marchand had purported to make in the Nile Valley on behalf of France was, therefore, a violation of the rights of Great Britain and Egypt. In this case it was a re-conquest of territory that had never been finally abandoned that was in question, and Great Britain relied in the main on that fact, but the same principle would appear to apply where the overthrow of the local forces had been effected in an original conquest.

See Ch. VI.  
above.

### *Consequences of Conquest.*

The inhabitants of conquered and annexed territory who were subjects of the defeated sovereign, and who remain in the territory, become subjects of the conqueror for external purposes, while their rights within the conqueror's State will depend upon his municipal law. Where territory has been taken from a State which has not been extinguished, it is usual

Westlake's  
Collected  
Papers,  
476 sq.  
Hall III.  
IX. § 203.

to allow the inhabitants of the territory to retain their old allegiance—generally upon condition that they leave the territory—provided they opt to do so within a given time.

As regards the rights and duties of a conquering State *vis-à-vis* the inhabitants of the conquered territory and in regard to other States, the position is for most purposes the same whether the acquisition has been made by way of conquest or of cession, and the rules in relation to native property and other matters, which are worked out in Part IV of this treatise for the case in which the full sovereignty has passed, are applicable.

Transvaal  
Concessions  
Com-  
mission's  
Report,  
1901,  
Cd. 623,  
p. 7.

## CHAPTER XXI.

### CESSION.

Phillimore,  
I. Ch. XIV. A **CESSION** of backward territory may be made by the native sovereign ; or by an advanced sovereign, such as a modern State, by whom the territory has been previously acquired. A cession may comprise the whole of the sovereignty over the territory ; or it may cover part only of the sovereignty, as in the case where the external sovereignty is ceded by a native chief in return for protection. It may be by way of exchange, sale or gift.

#### Cession by an Advanced Sovereign.

Vattel, I.,  
§ 266 & II.,  
§ 308 sq.  
Hall II. X.,  
§ 108.  
Westlake,  
I., Ch. XII.  
F.O. Hand-  
book, No.  
80. Where the ceding sovereign is an advanced State, the cession should be made by the person or body recognized as competent to make it by the Constitution of that State. A cession which was not within the powers of the body or person purporting to make it would be voidable ; thus Portugal repudiated the cession to the Dutch of certain East Indian islands which was made by Lopes de Lima without authority in 1854. A cession would also be voidable which was obtained, at all events in peace time, through fraud, or by force applied to the persons negotiating on behalf of the ceding State.

A cession is not, however, void merely by reason of its having been extorted by force threatened or directed towards the State as a whole—cessions have frequently been made by a defeated State as the price of the termination of hostilities. Such a forced cession, from the point of view of morality and justice, may differ in nothing from a conquest ; its results are recognized by International Law on a similar footing. A State which cedes territory under compulsion may, however, be able to make the cession subject to mitigating conditions, which the transferee State may be willing to accept in return for the advantages which a cession offers as compared with a conquest.

*Cession of the Congo Free State to Belgium.*

The Congo Free State, before its cession to Belgium, was treated as the personal possession of King Léopold. It had been joined to Belgium only in a personal union, due to the fact that King Léopold was sovereign of both countries. In 1889, the King made a Will, devising his sovereign rights over the Congo Free State to Belgium. In 1890, Belgium agreed to make a loan to the Free State over ten years on condition that, at the end of that term, she should have the option of annexing the territory. When the term had expired, however, the King opposed immediate annexation by Belgium, and the cession was not made until 1907.

See Ch. XII.  
above.  
F.O. Hand-  
book No.  
98, pp. 37 sq.  
Cd. 3450  
(1907),  
pp. 11 sq.

By the Treaty of Cession of the 28th November, 1907, and the additional Treaty of the 5th March, 1908, King Léopold as 'Roi-Souverain du Congo' ceded to Belgium 'la souveraineté des territoires composant l'État Indépendant du Congo avec tous les droits et obligations qui y sont attachés.' The Belgian State declared that it accepted the cession, assumed certain obligations of the Free State, and engaged to respect legally-acquired rights, whether native or non-native.

100 S.P.  
705.  
101 S.P.  
720.

*Sale of the Danish West India Islands to the United States.*

A Treaty of Cession which is particularly instructive in the completeness of its provisions regarding the various incidents connected with the transfer of territory that has been under the administration of a modern State, is that by which Denmark agreed, in August 1916, to the sale of the Danish West India Islands to the United States for \$25,000,000 coupled with the United States' recognition of Danish sovereignty over the whole of Greenland. The sale was finally authorized by the Danish Parliament after it had been approved by a referendum in Denmark.

110 S.P.  
848.  
Ann. Reg.  
1916,  
p. 291.

By the treaty, the King of Denmark ceded to the United States 'all territory, dominion and sovereignty, possessed, asserted or claimed by Denmark in the West Indies,' and the cession was stated to include 'the right of property in all public, government, or crown lands, public buildings, wharves, ports, harbours, fortifications, barracks, public funds, rights, franchises and privileges, and all other public property of every kind or description now belonging to Denmark together with all appurtenances thereto,' as well as the relevant government archives, records, papers or documents. The cession was stated

to be free and unencumbered by any unspecified 'reservations, privileges, franchises, grants or possessions'; but it was not to impair private rights of property belonging to individuals, municipalities, ecclesiastical or civic bodies, and other associations.

Special provisions dealt with the arms and military stores in the Islands; the movables in government buildings; the pecuniary claims of Denmark against the Islands and against private individuals therein; the maintenance of certain specified grants and concessions; the payment of allowances to retired functionaries; pending judicial proceedings; copyrights and patents; and the formal delivery of possession.

The treaty also made provision of the usual kind in respect of the Danish population of the Islands. Danish citizens residing in the Islands might remove therefrom and retain their property, or remain therein, at will. If they remained, they were to be secured in their rights and liberties, and, on making a declaration within a year of the ratification of the treaty, they might preserve their Danish citizenship, otherwise they became citizens of the United States.

#### *Rights of Pre-emption.*

A State is sometimes given the right of pre-emption over certain territories in the event of their sovereign deciding to dispose of them. When such a right is given by a native chief it usually betokens a protectorate over his territories; but such rights are sometimes given by one advanced State to another.

See Ch.  
XXIII.  
below.

France and  
Spanish  
West  
Africa.

F.O. Hand-  
book, No.  
126, p. 63.  
92 S.P.  
1018.

For example, the Franco-Spanish Convention of the 27th June, 1900, provides that, in the event of the Spanish Government deciding to cede Spain's possessions in West Africa 'à quelque titre que ce fût, en tout ou en partie, . . . le Gouvernement Français jouira d'un droit de préférence dans des conditions semblables à celles qui seraient proposées au dit Gouvernement Espagnol.'

France  
and the  
Belgian  
Congo.

Similarly France, who possessed a right of preference over the territories of the Congo Free State second only to that of Belgium, had that right continued to her after the country had been annexed to Belgium. The right was preserved in the following terms:

108 S.P.  
338.

I. Le Gouvernement belge reconnaît à la France un droit de préférence sur ses possessions congolaises, en cas d'aliénation de celles-ci à titre onéreux, en tout ou en partie.

Donneront également ouverture au droit de préférence de la

France, et feront, par suite, l'objet d'une négociation préalable entre le Gouvernement belge et le Gouvernement de la République française, tout échange des territoires congolais avec une Puissance étrangère; toute concession, toute location desdits territoires, en tout ou en partie, aux mains d'un État étranger ou d'une compagnie étrangère investie de droits de souveraineté.

II. Le Gouvernement belge déclare qu'il ne sera jamais fait de cession, à titre gratuit, de tout ou partie de ces mêmes possessions.

While it would seem that the right of pre-emption cannot be regarded as transferable to a third State without the consent of the State by whom it was given, there would appear to be no reason why the State to whom the right has been granted should not renounce it in favour of a third State in case the grantor State should be willing to cede the territory to that third State. Such a renunciation was, in fact, made by France in 1911 when she renounced in favour of Germany, as part of the Morocco settlement, the rights of pre-emption over Spanish Guinea and the Corisco and Elobey Islands which had been secured to her by the Franco-Spanish Convention of the 27th June, 1900, to which we have already referred.

Transfer-  
ability of  
right of  
pre-emption.

104 S.P.  
953.  
F.O. Hand-  
book, No.  
42, p. 90.

### Cession by a Native Sovereign.

Numerous instances of cessions by native sovereigns are given in Chapter XXIII below, in which it is shown that such cessions have transferred varying portions of the sovereignty, from the external portion only to the full external and internal sovereignty. Here we shall be concerned only in an endeavour to ascertain, from a consideration of actual practice and from principle, what are the rules governing the manner in which a treaty ought to be concluded, and we shall deal with the objection that such rules can only be rules of morality and not of law.

#### *The Paramount Authority should be a Party to the Agreement.*

In the first place, such an agreement can only validly be made with, or with the consent of, the chief or Government to whom the paramount rights over the region belong.

It is sometimes difficult, in dealing with backward races, to ascertain whether the chief on the spot is independent or is only the vassal of a more powerful chief. Some rules for the determination of such a question were laid down by the King of Italy in his Arbitral Award of the 80th May, 1905, respecting the western boundary of the Barotse Kingdom. His Majesty held

Marks of  
para-  
mountcy.  
98 S.P. 332.

that the payment of tribute did not of itself denote dependence, nor did the mere fact that the chief of a powerful tribe exerted influence over weaker races, but that,

selon l'organisation interne des tribus le Chef Suprême est celui qui exerce l'autorité gouvernementale selon leurs coutumes, c'est-à-dire, en nommant les Chefs subalternes, ou en leur accordant l'investiture, en décidant des litiges entre ces Chefs, en les déposant selon les circonstances, et on les obligeant à le reconnaître comme leur Seigneur Suprême.

Several cases have occurred in which a cession has been accepted, from a subordinate chief, of rights which he had no power to convey.

Great Britain and France on the Niger.  
*See Ch. IV. above.*  
Shaw: *A Tropical Dependency*, 359.

Great Britain came very near to losing her rights of priority to certain territory on the Niger through making the treaty with a subordinate chief. The French asserted that the chief at Boussa, with whom the British treaty had been concluded, was the vassal of a more important chief at Nikki, and it came to be understood that the rights which the British claimed under the treaty could not be maintained if another Power should obtain a subsequent cession of similar rights from the Nikki chief. Hence followed a 'race' to Nikki. The determination with which the British joined in the race shows that they recognized the insufficiency of the Boussa treaty, and it was only by reaching Nikki first, and concluding another treaty, that they were able to retain the region in question.

Italy on the Red Sea.  
73 S.P.  
1242 sq.

A controversy involving the question of the capacity to cede territory of certain chiefs on the Red Sea took place between England and Italy in 1880-1. The Italian Rubattino Company obtained from the Sultan of Roheita, whom they alleged to be independent, a cession of the sovereignty over territory at Assab Bay. This territory was claimed by the Khedive of Egypt, governing under the suzerainty of the Sultan of Turkey. Great Britain contended that the sovereignty of the Sultan of Turkey and the Khedive had been fully established, and Lord Salisbury urged that 'to hold that that sovereignty, so formally claimed and exercised, can be invalidated or interrupted by the action of any local chief would be a principle dangerous in its general application, and to which Her Majesty's Government could not with propriety give their assent.'

ib. 1298.

France in Madagascar.  
75 S.P. 161.

The same contention was put forward by the Malagasy Ambassadors in 1882 in regard to the treaties concluded by France in 1841 with certain chiefs in North-west Madagascar.

'No civilized nation,' they urged, 'can ever recognize the rights of a section of their people, while in rebellion, to alienate any portion of its territory to a foreign Power.'

Similar considerations of course apply where the superior sovereign of the Chief who purports to make the cession is a modern State. In his Arbitral Decision of the 21st April, 1870, awarding the Island of Bulama and certain territory on the West African mainland to Portugal, the President of the United States found that the title put forward by Great Britain was 'derived from an alleged cession by native Chiefs in 1792, at which time the sovereignty of Portugal had been established' over the territories in question.

The  
Bulama  
Arbitra-  
tion.  
61 S.P.  
1103 sq.  
F.O. Hand-  
book, No.  
118, p. 10.

In some treaties, the rights of a suzerain chief are recognized, or the contracting chief definitely declares that he is independent. For example, the treaty made by Dr. Karl Peters on behalf of the German Colonization Society with Mangungu, Sultan of Msovero, in Usagara, East Africa, in 1884, is stated to be subject to any existing suzerainty rights of Mwenyi Sagara. In this treaty it is further recorded that the Sultan, on direct inquiry, had declared that he was not in any way dependent upon the Sultan of Zanzibar, and that he even did not know of the existence of the latter.

Germany  
in East  
Africa.  
77 S.P. 12.

In several of the treaties made by Great Britain with native chiefs and States in West Africa in 1888, the chief or king declares that he 'is perfectly independent, and pays tribute to no other Power.'

Great  
Britain in  
West  
Africa.  
79 S.P.  
615 sq.

Such a unilateral declaration, made to a third party, could not, of course, impair the rights of a superior chief if any such rights in fact existed. But if a dispute should subsequently arise it might prove to be valuable. Thus, the declarations in the treaties made by the German Colonization Society in East Africa were subsequently appealed to by the German Government as furnishing evidence against the claim of the Sultan of Zanzibar to sovereign rights over the territories ceded. In cases of doubt the point should, therefore, be put directly to the ceding chief, and a definite pronouncement obtained as to whether he considers himself to be independent or not.

77 S.P.  
1115.

### *Capacity of the Parties.*

Secondly, the treaty should be made, or assented to, by the person or body who, according to the law of the Government or the custom of the tribe, possesses, or might reasonably be expected to possess, the power to make the cession. One of the

Delagoa  
Bay Arbitration.  
C.-1361  
(1876),  
95.

grounds upon which the Portuguese Government objected to one of the treaties which Great Britain put forward in the Delagoa Bay Arbitration was that the chief with whom it purported to have been made had not the power to make it according to the law and custom of Têmbé.

### *Form.*

Thirdly, the agreement should be made or executed in the form which is usually adopted for acts of a public nature among the people with whom it is contracted.

Great  
Britain and  
New  
Zealand.  
See p. 41  
above.

Thus Great Britain, in 1839, required, before she would annex New Zealand, 'the free and intelligent consent of the natives, expressed according to their established usages.'

The Lamu  
Arbitration.  
22 R.D.I.  
364.  
Hertelet:  
Map of  
Africa, etc.  
III. 894.

In his decision in the matter of the dispute between Great Britain and Germany with reference to the Island of Lamu, Baron Lambermont, dealing more particularly with the contention that the Sultan of Zanzibar had entered into a convention with the Gorman Company, laid down that a treaty made with backward nations should be in writing :—

Attendu que, si aucune loi ne prescrit une forme spéciale pour les conventions entre États indépendants, il n'en est pas moins contraire aux usages internationaux de contracter verbalement des engagements de cette nature et de cette importance ;

Que l'adoption de la forme écrite s'impose particulièrement dans les rapports avec les gouvernements de nations peu civilisées, qui souvent n'attachent la force obligatoire qu'aux promesses faites en une forme solennelle ou par écrit.

22 R.D.I.  
361.

Now there are obvious advantages in having the treaty in a permanent form, and the fact that an alleged agreement has not been embodied in a written document is always liable to arouse feelings of doubt and suspicion as to the genuineness of its provisions. But, as M. Rolin-Jaequemyns has contended, it is probably going too far to say that only the written form is valid. Any solemn form which is recognized by the laws and traditions of the native society should be equally effective.

### *The Nature of the Agreement should be understood by the Parties to it.*

Fourthly, steps should be taken to ensure that the provisions of the agreement are understood by the natives concerned.

Walker,  
I. p. 299.

As early as the sixteenth century, Victoria, far in advance of his age, maintained that fear and ignorance vitiated freedom of choice on the part of the barbarians.

In recent times it is certain that in many cases in practice the native chief has been quite unaware of the effect of the consent he has given to the document presented to him by the agent of the European Government. One of Great Britain's objections to the claim of Spain to sovereignty over the Sulu Archipelago was put upon the ground that the Sultan of Sulu had not understood the true meaning of the Treaty of 1851 in which he had formally recognized the sovereignty of Spain. The Portuguese, in the Delagoa Bay Arbitration, declared that what the British regarded as treaties of cession were considered by the chiefs to be merely lists of the merchandise which had been promised them.

C.,—3109  
(1882),  
p. 71.  
C.—1381  
(1876),  
p. 94.

An agreement to which an ignorant chief has affixed his mark without understanding a word of it, or having any correct idea as to its consequences, can have no validity, either as binding the natives or as against other Powers. Even among those who argue that the backward races have no legal rights as against the representatives of a more advanced civilization, it would be difficult to find anyone to defend the attempt to give a legal form to an acquisition by practising deception upon, or taking advantage of the ignorance of, the contracting natives; and evidence is not wanting that by some, at all events, of the members of the International Family the validity of an act of cession is considered to depend upon its having been understood as such by both of the parties to it.

Thus Lord Salisbury in 1889, referring to the distribution of Portuguese flags as presents to chiefs 'who, in fact, are in total ignorance of the meaning which may attach to such gifts in the eyes of Europeans, and of the possibility of their entailing claims of vassalage,' said that 'Her Majesty's Government cannot recognize any claims which may be hereafter advanced on the part of Portugal to sovereignty over territories in the Nyassa districts, based upon the distribution of flags to the ignorant native chiefs.' The reply of the Portuguese Government was, not to deny that it was necessary that the chiefs should understand the effect of the acceptance of the flags, but to contend that they did in fact realize its significance.

Lord  
Salisbury  
and  
Portugal.  
81 S.P.  
995-7.

'No such Convention or Organic Proclamation [for securing to the South African Republic jurisdiction, protection, and administration over Swaziland] would be entitled to recognition from Her Majesty's Government,' runs the Convention between Great Britain and the South African Republic of November 1893, 'unless the said Government were satisfied

Great  
Britain and  
Swaziland.  
85 S.P. 680.

An agree-  
ment is  
a legal  
obligation  
in the case  
of a pro-  
tectorate ;

See Ch.  
XXIII.  
*below*.  
IX. Ann.  
249.  
X. Ann.  
189.

The consensus of civilized States, upon which the rules of International Law rest, can, and frequently can only, be proved \* by evidence of usage to be obtained from the action of nations in similar cases in the course of their history ' ; and it is difficult to see how, having regard to the universality of the practice of grounding a colonial protectorate upon an agreement with the local authority, and to the importance attached by the European Powers to these agreements in their relations *inter se*, the requirement for such an agreement can be regarded otherwise than as a rule of law.

The draft of the declaration submitted by the committee under M. de Marlitz to the Institute of International Law in 1888 made the conclusion and notification of an agreement with the native chief the only necessary conditions of the validity of a Colonial Protectorate. Article VI of that draft was worded as follows :—

Une occupation à titre de *protectorat*, pour devenir effective, suppose la conclusion d'un accord avec le chef d'un peuple indigène, par lequel ce dernier, tout en maintenant son autonomie politique et administrative, est placé sous la protection de l'État occupant contre les étrangers. Elle doit être accompagnée de la notification officielle de cet accord.

See  
Ch. XIX.  
*above*.

Although the Institute rejected this Article in favour of the one put forward by M. Engelhardt, it did so, not because it did not consider that the agreement was necessary, but on the ground that it was not sufficient, without the establishment of a responsible local authority, to give a good title to the protecting Power.

and the  
rules  
necessarily  
follow.

If we allow that an agreement is required, and that it must be a real one and not a mere meaningless formality so far as one of the parties to it is concerned, the first four rules enumerated above follow as a necessary consequence ; while the examples quoted in this Chapter, and others which might have been mentioned, furnish a considerable body of evidence in their support. It would no doubt be going too far to say that all the rules must or could be complied with literally in every case, but they should be observed in spirit and in substance if the cession is to be a valid one.

Westlake's  
objection  
answered.

The objection urged by Westlake that, if this be so, a Power which had conformed to the requirements of the Berlin Act might still have a bad title, does not appear to prove that the rules cannot be legal ones ; and this for two reasons.

\* *West Rand, etc. Co. v. Rex* (1835), 2 K.B. at 401 ; and See Preface above.

In the first place, it was made clear at the Berlin Conference that the rules laid down in the Final Act represented the 'minimum of the obligations which devolve on an occupying State,' and it was recognized that other necessary conditions might exist or might come into existence.

Secondly, if a Power had actually complied with the conditions of the Berlin Act and established an efficient administration in the district, it should, it would seem, be regarded as having thereby cured any defect that might have originally existed in its title due to non-compliance with the rules enumerated above, and to have established that title upon a valid prescriptive basis. For the establishment of such an administration would take a considerable time, and the fact that it was being done would be known to any party likely to be interested ; and if a party who might have disputed the goodness of the Agreement took no steps to do so until after the establishment of the administration had been completed, it would appear that, by its laches, it had lost its right to contest the title of the State in possession.

The sanction of the rules seems to consist in this ; that, if they are not in substance complied with, the acquiring Power loses the legal protection which a valid Agreement would have given it for a reasonable time between the making of the Agreement and the establishment of an efficient administration over the territory.

The  
sanction  
of the  
rules.  
  
See Ch.  
XIX.  
above.

## CHAPTER XXII.

### PRESCRIPTION.

Grotius II. IV.  
 Vattel II. XI.  
 Phillimore,  
 I. Ch. XIII.  
 Hall II. II. § 36.  
 Oppenheim,  
 I. § 242 sq.  
 Wheaton, 268 sq.  
 Norway.  
 Sweden.  
 Maritime  
 Frontier  
 Arbitration,  
 102 S.P. 947.

A just  
 origin un-  
 necessary.  
*Just. Inst.*,  
 II., vi.  
 Bluntschli,  
 § 290.

Nature of  
 the régime  
 necessary.

See Ch.  
 XIX.  
 above.  
 88 S.P. 1288.  
 Phillimore,  
 I. § CCCLX.

A PRESCRIPTIVE title to sovereignty arises in cases where no title, or no sufficient title, can be shown by way of Occupation, Conquest or Cession, but the territory has remained under the continuous and undisturbed sovereignty of the claimant for so long a period that the position has become part of the established international order. 'Dans le droit des gens,' said the Hague Tribunal in 1909, 'c'est un principe bien établi qu'il faut s'abstenir autant que possible de modifier l'état des choses existant de fait et depuis longtemps.'

The international rule differs from the Roman law of *usucapion* in not requiring that possession shall have been taken *bona fide* and *ex justa causa*. The object of the rule, as it operates between nations, is the practical one of preventing a disturbance of long-established international conditions, and International Law protects such conditions when their existence is proved, without inquiry as to whether they originated in justice or in injustice.

The nature of the régime that ought to be set up in order that Prescription may run in favour of the sovereign in possession will vary with the circumstances of the case.

In the Venezuela-British Guiana boundary controversy, the United States Secretary of State quoted with approval Sir Robert Phillimore's statement that 'the proofs of *prescriptive possession* are simple and few. They are, principally, publicity, continued occupation, absence of interruption (*usurpatio*), aided no doubt generally, both morally and legally speaking, by the employment of labour and capital upon the possession by the new possessor during the period of the silence, or the passiveness (*inertia*), or the absence of any attempt to exercise proprietary rights by the former possessor.' In the dispute in question, the matter at issue had reference to the occupation and settlement of land previously held by the

Indians, and, when the dispute was remitted to arbitration, it was agreed that the arbitrators should be governed by the rule that they might 'deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.'

The Hague Tribunal, in its Award (from which we have already quoted) dealing with the claims of Norway and Sweden to a portion of the territorial belt of the ocean, laid down that 'ce principe (respect for long-established conditions) trouve une application toute particulière lorsqu'il s'agit d'intérêts privés, qui, une fois mis en souffrance, ne sauraient être sauvegardés d'une manière efficace même par des sacrifices quelconques de l'État auquel appartiennent les intéressés.' (The private rights in question were those of lobster fishers.)

It may, however, perhaps be doubted whether the preservation of the private rights of individuals is in itself an object of Prescription as known to International Law; although the fact that such rights had been allowed to grow up wholly or mainly in favour of the subjects or citizens of one of the claimants would, no doubt, be a relevant consideration if a claim to exclusive control had to be proved, and would also probably be pertinent to what appears to be a more important consideration—whether the claimant's position had been acquiesced in by other States, and particularly by a rival claimant.

In any case, in view of the importance now attached to the effective occupation of any territory which a State wishes to appropriate to itself, it would appear that Prescription should not be considered to run in favour of a claimant who had not occupied the territory effectively in the sense, and subject to the variations to meet special cases, which we have considered in Chapter XIX.

And, just as the conditions which must be present for Prescription to run may vary in different cases, so also the length of time during which those conditions must operate before it can be said that they have become part of the established international order, will vary according to the circumstances.

'It seems to be thought,' said the United States Secretary of State in 1896, referring to certain observations of Lord Salisbury's in the case of the Venezuela-British Guiana controversy, 'that the international law governing territorial acquisition by a State through occupation is fatally defective

120 S.P.  
947.

*Direct U.S.  
Cable Co.  
v. Anglo-  
American  
Telegraph  
Co. (1877),  
2 A. C. 394.  
88 S.P.  
1282.*

*Length of  
possession  
necessary.*

88 S.P.  
1286.

because there is no fixed time during which occupation must continue. But it is obvious that there can be no such arbitrary time limit except through the consensus, agreement or uniform usage of civilized States. It is equally obvious and much more important to note—that, even if it were feasible to establish such arbitrary period of prescription by international agreement, it would not be wise or expedient to do it. Each case should be left to depend upon its own facts.'

'A State which in good faith colonizes as well as occupies,' continued the Secretary of State, 'brings about large investments of capital and founds populous settlements, would justly be credited with a sufficient title in a much shorter space than a State whose possession was not marked by any such changes of status.'

When the matter with which the United States and Great Britain were then concerned was submitted to arbitration, it was agreed that 'Adverse holding or prescription during a period of fifty years shall make a good title.' The part of South America in question had, however, been occupied in a half-hearted and not particularly effective fashion, and in a case where effective occupation and administration could be shown, a much shorter period of control would probably be held to suffice.

*See Ch.  
XIX.  
above.*

## CHAPTER XXIII.

### PROTECTORATES.

THE assumption by a comparatively powerful State of the duty of protecting a weaker State is an institution of considerable antiquity. In the earlier instances the weaker State might gain the advantage of protection without losing its sovereignty. In the later examples of the older type of protectorate, however, an essential feature of the arrangement has been that the protected State has handed over the conduct of its external affairs to the protecting Power, or accepted its dictation in regard to those affairs, and has thus parted with part of its sovereignty without, however, losing the whole of its independence.

A standard instance of such a protectorate is that which was exercised by Great Britain over the Ionian Islands from 1815 to 1864. Great Britain had no desire to accept the position of protector, and was with difficulty prevailed upon by the Emperor of Russia to undertake the task in the interests of the Ionian Islanders. The protectorate was set up by three separate identical treaties which Great Britain made with Russia, Austria, and Prussia respectively, by which it was declared that the Islands should form 'un seul état, libre et indépendant,' which should be placed under the 'protection immédiate et exclusive' of the King of Great Britain. The external sovereignty of the Ionian Islands was in this way placed in the hands of Great Britain; but it was always exercised as on behalf of a separate State, and the Ionian Islanders did not participate in the benefit or the burden of any international arrangements made by Great Britain, unless they were expressly made parties to them, and they might remain at peace while Great Britain was at war. The Islands were governed under a constitution adopted by the local legislature,

Protectorates of the older type.  
\*

Despagnet :  
*Les Protectorats*, 56.  
Twiss,  
§§ 25-36.  
*See Duff*  
*etc. Co.*  
*v. Kelantan*  
1894 A. C.  
797.

Great Britain and the Ionian Islands.  
*The Ionian Ships*,  
28 Spinks,  
215.  
Pitt  
Cobbett, 56.

\* Dr. Baty: *Brit. Year Book of Int. Law*, 1921-2, p. 108. Grotius, I. III. XXI. Vattel, I., §§ 6 & 192. *Worcester v. State of Georgia*, 6 Peters at 561.

and had their own commercial flag; but even in internal affairs considerable control was exercised by the protecting Power. After some time the Islanders desired annexation to Greece; and in 1864 they were ceded to that country with the consent of the guaranteeing Powers.

*See Grotius*  
II. XV.  
VII. (2).

The protectorate made use of in the extension of European dominion.

In such protectorates there was necessarily considerable restriction imposed upon the sovereignty of the protected State; but in its internal affairs that State could still retain freedom of action to almost any extent, except in such matters as might involve it with foreign Powers. By such an arrangement, one State could acquire complete control over another, so far as third nations were concerned, without necessarily assuming the burden of its administration, and it was this feature of the protectorate which favoured its extensive adoption by European Powers in the spread of their dominion. It was possible, by concluding a treaty of protection with the local government or the native chiefs, to exclude other Powers from the region so dealt with, and thus, by a rapid and inexpensive method, to acquire over considerable areas rights which, so far as other Powers were concerned, could be developed into complete sovereignty by degrees.

#### Colonial Protectorates.

*See Duguesne;*  
*Les Protectorats,*  
66 & 222.

The protectorates of the older type were usually exercised over a State in an advanced stage of development, and were not in general intended to be a step in the process of absorption. The more modern protectorates have been established over political societies of very varied degrees of advancement, and they have been usually intended or destined to result in the incorporation of the protected region into the dominions of the protecting Power, or, at all events, in an increasing control by that Power over the internal affairs of the protected country. The sovereignty is to be acquired piecemeal, the external sovereignty first. This is generally patent; but the use of the term 'protectorate,' which still is consistent with the retention of a considerable amount of internal sovereignty by the protected ruler, is calculated to render the first step in the process more palatable to the inhabitants of the territory that is being acquired or controlled, and less obnoxious to opponents of colonial expansion in the acquiring State.

*Westlake,*  
I. VI.

The term 'colonial protectorate' is usually applied to those modern protectorates in which the society to be protected is a

backward one, and where such government as exists is often of the most rudimentary nature. But the distinction between a protectorate proper and a colonial protectorate does not, it is submitted, depend so much upon the degree of civilization and political development of the inhabitants of the protected territory as upon the international effect of the protectorate. An essential feature of the colonial protectorate is that it is recognized by the other members of the International Family as giving to the protecting Power the right, as against themselves, to take steps in the direction of annexing the protected territory to its dominions.

Treaties with native African rulers were not unknown during the competition among the European Powers for trading stations in Africa in the seventeenth century, but it was during the colonizing activity which marked the last quarter of the nineteenth century that their use became so widespread and assumed such importance. The first step in the acquisition of territory inhabited by backward peoples was normally the conclusion of a treaty with the local rulers, and this step either amounted to, or was followed soon afterwards by, the establishment of a protectorate. In many cases the treaty, in form, ceded only so much of the sovereignty as it is essential for a protecting power to possess, i.e. the external sovereignty. In many other cases it ceded, even in form, the whole of the internal and external sovereignty. Between these two extremes there was a very large number of treaties differing among themselves, both as regards the proportion of the sovereignty which they purported to convey and also with respect to their other provisions.

F.O. Handbook, No. 110, p. 15.  
 Cd. 1361 (1878), p. 163.  
 Scott Keltie: Chs. IV. & V. Colonial protectorates established by making treaties with local rulers.  
*See* Ch. XXI. *above*.

The treaties differed considerably among themselves.

*Treaties purporting to set up a Protectorate pure and simple.*

Among the treaties which ceded only the external sovereignty, several of those made by Great Britain in 1886 with native chiefs on the Somali Coast are models of conciseness. In two short Articles they deal adequately with both those aspects of the arrangement which form the essential features alike of the protectorates of the older type and of the modern colonial protectorates—the promise of protection on the one side and the handing over of the external sovereignty on the other. That, for example, made with the Habr Toljaala contains only three Articles, as follows:—

Hall: *Foreign Powers*, etc. §92.  
*R. v. Gwyn*  
 1910, 2 K.B. at 619.

77 & P. 1265.

Art. I. The British Government, in compliance with the wish of the undersigned Elders of the Habr Toljaala, hereby undertakes

to extend to them, and to the territories under their authority and jurisdiction, the gracious favour and protection of Her Majesty the Queen-Empress.

II. The said Elders of the Habr Toljaala agree and promise to refrain from entering into any correspondence, Agreement, or Treaty with any foreign nation or Power, except with the knowledge and sanction of Her Majesty's Government.

III. This Treaty shall come into operation from the 1st day of February, 1886.

*Ib.*, 1263.

It is instructive to compare this treaty with that made with the neighbouring Warsangali. Articles I and II of the Warsangali Treaty are identical, *mutatis mutandis*, with Articles I and II of the treaty given above, but the Warsangali Treaty contains, in addition, a number of other Articles which clearly import a considerable restriction upon the internal sovereignty of the chiefs. By these Articles, the chiefs agree, not only to put a stop to the slave trade in their territories and to accept a British Resident, but also to act upon the advice of British officers 'in matters relating to the administration of justice, the development of the resources of the country, the interests of commerce, or in any other matter in relation to peace, order, and good government, and the general progress of civilization.'

Some of the treaties definitely provide against any interference by the European Power in the internal affairs of the protected people. For example, by the treaty made in March, 1883, with the King of Baol (whose territories now form part of the French Colony of Senegal), the country was placed under the protection of France, and it was provided that

Martens,  
2nd Series,  
IX. p. 219.

La République française ne s'immiscera ni dans le gouvernement ni dans les affaires intérieures du Baol. Les droits du Teigne (de roi) et de ses successeurs restent absolument les mêmes que par le passé.

76 S.P.  
506 *et*.  
Martens,  
2nd Series,  
XI., p. 470-  
83.

The treaties of protection and friendship made by Germany in 1885 in what afterwards became German South-west Africa might also have applied to a protectorate of the older type. For example, by the treaty with the Red Nation in Great Namaqualand—which in its principal provisions was almost identical with the treaties made with Rehoboth and with the Hereros—the people of the country were taken under the protection of the German Emperor; treaties which the chiefs had already made with other nations were to remain in force; the chief was not to be prejudiced in levying such taxes as the

laws and customs of his land admitted, or in the exercise of justice over his subjects; no treaties were to be made with other Governments, and no land was to be ceded to foreign nations or people, without the consent of the German Emperor; Germany was given most favoured nation treatment; disputes between white people were to be settled by authorities appointed by the German Emperor; and the chief promised to refer to the German Government any quarrel he might have with other chiefs.

*Treaties implying a Protectorate.*

Many treaties, especially among the earlier ones, contain no direct reference to the sovereignty or protectorate of the European contracting Power, although they comprise provisions which imply some kind of paramountcy on the part of that Power.

Thus, in the treaties which Great Britain made with certain chiefs on the West Coast of Africa in 1868 and 1875, it was provided that disputes between the chiefs themselves, or between the chiefs and other tribes or nations, were to be settled by a British officer. And in 1879 the chiefs of Zululand (annexed in 1897) promised to make no war without the sanction of the British Government, and to submit any unsettled disputes with other chiefs to British arbitration.

Again, the provision implying the supremacy of the contracting Power was frequently put in the form that the chiefs should not make treaties or arrangements with foreign Powers, nor cede their lands to foreign Governments, without the consent of the contracting Power. This was the case, for instance, in the treaty made by Great Britain in 1888 with Lo Bengula, Chief of the Amandebele tribe, in respect of territories which now form part of Rhodesia.

Although such treaties as these contain no explicit promise of protection on the part of the European Power, such protection must, it would seem, follow as a corollary of the right to control the external relations of the chiefs. A mere undertaking not to cede territory, save to a certain Power, does not, however, necessarily entail an obligation of protection on the part of that Power. In the case of Koweit on the Persian Gulf, a promise made by the Sheikh in 1899 to cede no territory and to receive no foreign representative without the sanction of the British Government was not sufficient to prevent the British Government from informing the Ottoman Government that no

86 S.P.  
660 sq.  
87 S.P. 89.

70 S.P.  
323.  
78 S.P.  
788.

79 S.P.  
868.

See Ch.  
XXIV.  
(3) below.  
F.O. Hand-  
book, No.  
76, pp.  
62 & 75.

British protectorate would be established over the Sultanate on condition that the Porte there maintained the *status quo*.—The British Government, however, subsequently found it necessary actively to protect the Sheikh against Turkish designs, and on the outbreak of the Great War to recognize Kuwait as an independent principality under British protection.

*Treaties of Full Cession.*

As examples of cases in which the full sovereignty was ceded, we may refer to the out-and-out way in which the Chiefs of the Batlapings and the Baralongs (British Bechuanaland), and the several chiefs in what afterwards became German East Africa, ceded their sovereign rights, as recounted in Chapter IV. The cession by the Wyanassa Chiefs and others (Nyasaland Protectorate) in 1890 was also of this type, as the following extract will show :—

Hartlet;  
Map of  
Africa, I.  
290.

We . . . most earnestly beseech Her Most Gracious Majesty the Queen of Great Britain and Ireland, Empress of India, Defender of the Faith, &c., to take our country, ourselves, and our peoples under her special protection, we solemnly pledging, and binding ourselves and our people, to observe the following conditions :—

I. That we give over all our country within the above described limits, all sovereign rights, and all and every other claim absolutely, and without any reservation whatever, to Her Most Gracious Majesty . . . her heirs and successors, for all time coming.

ib. 137 sq.  
C.-6372  
(1890).

The numerous chiefs who entered into agreements with the National African Company and its successor the Royal Niger Company agreed to cede the whole of their respective territories for ever.

*The Treaties gave the Powers rights inter se.*

But although the treaties varied widely in their terms, they all had the effect, as between the European Powers themselves, of securing to the Power which had been the first to conclude a treaty with the local chiefs, the exclusive control over the district concerned, with the ultimate right of annexing it. This is well brought out in those cases in which the representatives of two European States have 'raced' in order to be the first to reach a chief and make a treaty with him. Under such circumstances, the fact that the treaty has given to the Government on whose behalf it was secured exclusive rights over the territory of the chief, has been fully accepted by the other Government—which would itself have obtained those rights

had its representative reached the chief a few days earlier. Several such ' races ' are mentioned in Chapter IV, in which a number of instances are given that show how great is the weight attached by the European Powers to treaties made with native chiefs.

*See also*  
84 S.P.  
857.  
95 S.P.  
141.

*The Internal Sovereignty gradually passes to the protecting Power.*

Just as there is considerable variation in the proportion of sovereignty conveyed by the different treaties, so the amount of sovereignty which is actually exercised by the protecting State varies within wide limits. In all cases the external sovereignty is assumed. In internal affairs, the sovereignty of the local ruler may be scarcely impaired ; or it may be superseded by that of the protecting Power to any extent, such supersession usually proceeding gradually.

*See R. v. Crews*  
1910, 2 K.B.  
at 610 ;  
and *In re Southern Rhodesia*,  
1919 A. C.  
at 241.

*Bechuanaland Protectorate.*

The Bechuanaland Protectorate is an interesting example of a protectorate in which the internal as well as the external sovereignty has passed to the protecting Power, but the territory has not been formally annexed, so that, in the eyes of British law, it is not British territory.

*See Ch.*  
*IV. above.*

In 1884, treaties were made with the local chiefs, in virtue of which a British protectorate was proclaimed in March 1885. Later in the same year, the southern portion of the protectorate was made a Crown Colony with the name of British Bechuanaland, the rest of the protected territory being called the Bechuanaland Protectorate. The Protectorate was placed under the jurisdiction of the Governor of British Bechuanaland in 1890.

*Scott*  
*Keltie*, 155,  
403.  
*R. v. Crews*  
1910, 2 K.B.  
at 597  
and 611.

The position of this Protectorate, from the point of view of British law, was raised in the case of *R. v. Crews* which came before the Court of Appeal in 1910. A Chief, Sekgome, who had been detained in custody at a place within the Protectorate under a proclamation of the High Commissioner, applied for a writ of Habeas Corpus to be directed to the British Colonial Secretary. In connection with that application, it was necessary to decide whether the place where Sekgome was detained was within His Majesty's dominions. Lord Crewe, the Colonial Secretary, declared that :—

1910  
2 K. B.  
576.

The territory of the Bechuanaland Protectorate is foreign territory under His Majesty's protection ; it has never been acquired

*Id.* at 603.

by settlement, or ceded to, or conquered, or annexed, by His Majesty, or any of his Royal predecessors, nor has His Majesty, or any of his Royal predecessors, recognized the same as, nor is it, part of his dominions, but he has power and jurisdiction within the same.

*ib.* 603 & 4. 'The Bechuanaland Protectorate,' said Vaughan-Williams, L.J., in his judgment, 'is under His Majesty's dominion in the sense of power and jurisdiction, but is not under his dominion in the sense of territorial dominion.' Kennedy, L.J., put the position as follows :—

*ib.* 610. Within a Protectorate, the degree and the extent of the exercise by the protecting State of those sovereign powers which Sir Henry Maine has described ('International Law,' p. 58), as a bundle or collection of powers which may be separated one from another, may and in practice do vary considerably. In this Bechuanaland Protectorate every branch of such government as exists—administrative, executive, and judicial—has been created and is maintained by Great Britain. What the idea of a Protectorate excludes, and the idea of annexation on the other hand would include, is that absolute ownership which was signified by the word 'dominium' in Roman law, and which, though perhaps not quite satisfactorily, is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting State a foreign country.

*ib.* 623. His Lordship found that, in a portion of the Protectorate, the chiefs of the local tribes had 'abandoned all rights and jurisdiction in and over' such portion, and an Order in Council had defined these lands as 'Crown lands,' and vested them in the High Commissioner, who, under the powers conferred upon him by the Order, had made grants of certain tracts of these 'Crownlands.' In view of these facts, His Lordship experienced some difficulty in deciding that these lands formed no part of His Majesty's dominions, but he did so upon the principle that a sovereign cannot be forced to take territory, and in view of the fact that the lands were treated by the sovereign as parts of the Protectorate.

#### Protectorates over more advanced States.

There are and have been protectorates over peoples enjoying a relatively advanced civilization which are not usually referred to as 'colonial protectorates,' but which properly belong to this class if, as we have submitted, the distinguishing feature of a colonial protectorate is that it is recognized by the other

members of the International Family as forming a transition stage between independence and close control or absorption by the protecting Power, and as conferring upon that Power the exclusive right, as against themselves, of eventually incorporating the protected territory into its dominions. It is difficult, for example, to detect any fundamental differences, in regard to the way in which the protectorate was originated, to the attitude of other Powers, or to the subsequent tightening of European control, between the French acquisition of Tunisia and the appropriation by European Powers of many regions inhabited by considerably less advanced peoples.

### *Tunisia.*

France had been made aware in 1878 that, if she were to take Tunis, neither Great Britain nor Germany would raise any objection. But although France was not then ready to undertake the task, she intimated that she would not allow any other Power to do so. In other words, she considered that Tunis constituted for her what, even at that time, was beginning to be called a 'sphere of influence'; although Italy also had designs upon the Regency. In 1881, upon the plea that certain tribes on the frontier of Algeria must be punished, a large French army was sent into Tunis. The French Minister, in announcing the fact to the British Ambassador, added that he considered that the annexation of Tunis to France would be a mistake and a misfortune, although it was absolutely necessary that French influence should be predominant there. The Bey of Tunis perceived the obvious object of the invasion and protested against it, reporting the matter to his suzerain, the Sultan of Turkey, who also protested, both of them appealing to the European Powers. France refused to recognize the overlordship of the Sultan. The French general went, with an armed escort, to the palace of the Bey, and gave him four hours in which to sign the treaty that he had brought with him. This treaty the Bey signed under protest in the presence of *force majeure*. It in fact placed Tunis under the protection of France.

France engaged to support the Bey against any danger that might menace his person or his dynasty or compromise the tranquillity of his States. The Bey in return promised not to conclude any act of an international character without French consent. The diplomatic and consular agents of France abroad were to be charged with the protection of Tunisian interests and nationals. In addition, France was given a certain amount

73 S.P. 437 sq.  
XII. *Camb.*  
*Med. Hist.*, 239.  
C.-2888,  
2888, &  
2942 (1881).  
F.O. Handbook,  
No. 127, p. 19.

See 66 S.P.  
1008-9; &  
Ch. XXIV.  
*below*.

73 S.P.  
475.

72 S.P.  
248.  
C.-2388  
(1881).

of control in internal affairs. She at once put the treaty into execution, and proceeded to strengthen her hold over the internal administration.

F.O. Hand-  
book, No.  
127, p. 28.  
Arts. 16 &  
29.

During the Great War, the Turks laid a half-hearted claim to Tunisia, along with Algeria and Tripoli; but in the Peace Treaty of Lausanne they relinquished any such claim and agreed that Tunisians should enjoy in Turkey the same treatment in all respects as other French nationals (*ressortissants*).

### *Madagascar.*

75 S.P.  
149 sq.  
Scott  
Keltie,  
Ch. XXI.  
Bonfile,  
§ 187.

The events which led up to the annexation of Madagascar also exhibit a gradual increase of French control, although here the process has gone farther than in the case of Tunisia, and the series of steps by which it was carried out show differences in detail.

During the period 1840-8, France had made treaties with certain chiefs in the north-west of the Island, whom she claimed to be independent. In 1882, the Malagasy Government maintained that, at the time these treaties were made, the chiefs were in revolt against it, and had ever since remained in subjection. Great Britain regarded the Queen of Madagascar as monarch of the whole Island. As the desire of France to exercise the rights of a protecting Power over Madagascar was not reciprocated by the local Government, a French expedition was sent to the Island in 1883 upon the pretext of asserting a protectorate over the north-west part of the Island under the treaties of 1840-8, and of enforcing the interpretation placed by the French upon an article of a treaty made with the Malagasy Government in 1868 granting to French citizens the right of acquiring landed property.

76 S.P.  
477.  
Martens,  
2nd Series,  
12, p. 681.

After the war had dragged on for many months, and several towns had been bombarded by the French forces, the Government of the Island agreed to a Treaty of Peace, dated the 17th December, 1885. By this Treaty it was provided that the French Government should represent Madagascar in all its external relations; but the French Resident, who was to take charge of those relations, was not to interfere with the internal administration, which was to remain in the hands of the Queen of Madagascar. There was no direct reference to a protectorate in the treaty, although such a relationship would appear to have resulted necessarily from the provision as to external affairs.

82 S.P. 80.

Five years later, Great Britain recognized the French pro-

testorate in return for the recognition by France of the British protectorate over Zanzibar. Still the local Government was not prepared to acquiesce, and, in 1895, the French protectorate was reimposed by another military expedition. The treaty of the 1st October of that year marked a considerable step forward in the extension of French control. The Government of the Queen of Madagascar definitely accepted 'le Protectorat de la France avec toutes ses conséquences,' and not only was France to represent Madagascar in its external relations, but the French Resident-General was given control of the internal administration, and France reserved to herself the right to maintain a military force in Madagascar. 88 S.P. 447.

In November 1895, the French Minister for Foreign Affairs declared in the Chamber of Deputies that Madagascar was a French Possession; and, in December, Malagasy affairs were transferred from the direction of the French Minister for Foreign Affairs to that of the Minister for the Colonies. See also Ch. XXXII below. 87 S.P. 1180.

But, as the French Government admitted, France had not yet really annexed the Island, and the next step consisted in the French obtaining from the Queen of Madagascar a Declaration, dated the 18th January, 1896, by which the Queen took cognizance of 'la Déclaration de prise de possession de l'île de Madagascar par le Gouvernement Français.' 88 S.P. 1223.

The position, however, was still obscure. The 'taking possession' of a protected country as a step short of annexation was a procedure unknown to International Law; there was a good deal of controversy as to the nature of the relationship then existing between France and the Island; and Great Britain and the United States were not disposed to forgo their rights under treaties made with the Malagasy Government before the establishment of the French protectorate. 89 S.P. 1084.

Finally, by the French Law of the 6th August, 1896, Madagascar with the dependent islands was declared to be a French colony, the French Government resting the French title upon conquest, and expressing the view that the protectorate stage had been brought to an end by the Queen's signature to the Declaration of the 18th January. 75. 1075. 76. 1063.

### *French Indo-China.*

In Indo-China, too, where French protectorates were forced upon peoples in an advanced stage of civilization, France has gradually obtained a firmer hold upon the internal administration.

Martens,  
2nd Series, 12,  
pp. 627 & 637.  
Bonfils, § 186.  
XII.  
*Camb. Mod.*  
*Hist.* 523 sq.  
56 S.P. 402.

Cambodia was placed under French protection in 1863. In 1884, by a further treaty, France obtained increased powers with regard to internal matters. Now, she has practically complete control of the administration.

As early as 1863, it had been provided, by a treaty between France and Spain on the one side and Annam on the other, that French sanction should be obtained to all treaties of cession of territory; but France was not to be bound to help Annam against foreign nations. The French protectorate over Annam and Tonking commenced with a treaty of 1874. It had to be reimposed by a military expedition some nine years later. That the policy of the French was to acquire the internal sovereignty progressively is well shown by the report which the French Foreign Minister made to the French President in 1886. In this report the Minister expressed the opinion that :—

Bonfils,  
§ 186.  
Martens,  
2nd Series,  
12, p. 634.

*Ib.* p. 553.

Les seuls services sur lesquels le Résident général devra tout d'abord exercer une action directe, parce qu'ils n'existent actuellement qu'à l'état rudimentaire, sont les douanes et les travaux publics. . . . Plus tard, à mesure que notre autorité s'asseoira et que l'influence de notre civilisation pénétrera davantage le pays placé sous notre tutelle, nous serons conduits à exercer notre action dans un certain nombre de branches, dans la justice, l'instruction, les impôts, etc. Mais tous ces progrès doivent s'effectuer successivement, sans secousse et sans froisser les mœurs des populations auxquelles ils sont destinés.

The administration of Annam is now controlled by the French Resident-General; and all the important internal affairs of Tonking are also in French hands.

### *Abyssinia.*

81 S.P.  
735.  
XII.  
*Camb. Mod.*  
*Hist.* 240.

An instance of a case in which a process of the same general kind was commenced, but abandoned in its preliminary stages, is furnished by the attempt made by Italy to obtain control over Abyssinia. Under date the 2nd May, 1889, a 'Treaty of Friendship and Commerce' was made at Ucciali between the King of Italy and King Menelek of Abyssinia, Article XVII of which, according to the Italian text, read as follows :—

His Majesty the King of Kings of Ethiopia consents to make use of the Italian Government for any negotiations which he may enter into with other Powers or Governments.

81 S.P.  
736.

This Article was notified by the Italian Government to the other Powers. The same year, the King of Italy, in an addi-

tional Convention, recognized King Menelek as Emperor of Ethiopia. In 1891, Abyssinia was acknowledged by Great Britain to be within the Italian sphere of influence.

Italy based upon Article XVII a claim to suzerain rights over Abyssinia; but Menelek maintained that there was a discrepancy between the Amharic and Italian texts, and that, under the Amharic version, while he was at liberty to make use of the Italian Government in his dealings with foreign Powers, he had not consented to do so. 'Sous des apparences d'amitié,' he wrote to the Powers in denouncing the Treaty, 'on n'a en fait cherché qu'à s'emparer de mon pays . . . mon empire a une importance suffisante pour ne rechercher aucun protectorat et vivre indépendant.'

To enforce her claim, Italy sent a military expedition against Menelok. The Italian army, however, met with disaster at Adowa, and, by the Treaty of Peace of the 26th October, 1896, Italy recognized 'the absolute independence of Ethiopia as a sovereign and independent State.' In 1928, Abyssinia was admitted to the League of Nations.

Hertelet:  
*Map of  
Africa, etc.,*  
II., 487.  
83 S.P. 19.  
F.O. Hand-  
books,  
No. 128,  
pp. 13 sq.,  
No. 129,  
pp. 31 sq.

88 S.P. 481.

### Brunei.

The British protectorate over Brunei, in the Island of Borneo, which Westlake, writing before 1905, described as a protectorate 'of the ordinary international kind,' has since shown itself to be one of the type in which the internal sovereignty is gradually passing to the protecting Power.

By the Agreement of the 17th September, 1888, it was provided that the State of Brunei should continue to be governed by the Sultan 'as an independent State, under the protection of Great Britain'; but such protection was to confer no right on Her Majesty's Government to interfere with the internal administration of that State further than the Agreement provided. Great Britain was to decide any question that might arise respecting the right of succession to the rulership, to conduct the foreign relations of the State, and to have rights of extraterritorial jurisdiction over British subjects and British protected subjects and their property in Brunei.

In 1905, the Sultan, being 'desirous of being fully protected by the British Government,' and wishing 'for the assistance of that Government in the better administration of the internal affairs of his country,' agreed to receive a British Resident whose advice was to be 'taken and acted upon on all questions in Brunei, other than those affecting the Mohammedan religion.'

Westlake,  
I. VI.

18  
Hertelet,  
228.  
79 S.P.  
240.

25  
Hertelet,  
32.

26 Hertslet,  
33.

In 1908, by an Order in Council of the Sultan, the civil and criminal jurisdiction in the State was placed completely under British control. The magistrates of the lower courts were to be appointed by the Resident, or with his consent; appeal was to lie from the lower courts to the court of the Resident, thence to the Supreme Court of the Colony of the Straits Settlements, and from that court, in civil matters, to His Britannic Majesty in Council.

### *Kelantan.*

*Duff De-  
velopment  
Co. v.  
Kelantan  
Govt.,  
1924, A. C.  
797.*

The question of the status of the Sultan of Kelantan arose recently in the English Courts. Kelantan is under British protection, and notwithstanding that the external affairs of the State, as well as a considerable proportion of its internal affairs, are under British control, it was declared by the British Government, and accepted by the Court, that the Sultan is the Sovereign of an independent State.

*See Ch.  
XXIV.  
below.  
103 S.P.  
518.*

Kelantan was included in the territory in the Malay Peninsula over which the Siamese Government's rights of suzerainty protection, administration and control were transferred to Great Britain in March 1909. On 22nd of October, 1910, Great Britain entered into an Agreement with Kelantan in which the relations between the two countries were defined.

The Agreement recited that the State of Kelantan had been 'recognized to be under the protection of Great Britain'; and the Rajah engaged 'to have no political relations or political dealings with any foreign Power or potentate except through the medium of His Majesty the King of England.' The Rajah further recognized the right of the King of England to appoint an Adviser, whose advice he undertook to follow in all matters of administration other than those touching the Mohammedan religion and Malay custom. The Rajah also promised, among other things, that he would not, without British consent, have any dealings with a non-native concerning land, or grant any privileges for the construction of a railway, or appoint any non-native official.

In response to an inquiry from the Court, the British Colonial Office, in October 1922, stated that Kelantan was an independent State. The letter from the Colonial Office proceeded as follows :—

Not all the rights possessed by the King of Siam were ever exercised by His Britannic Majesty and the present relations between His Majesty the King and the Sultan of Kelantan which are those of

friendship and protection are regulated by an agreement signed on the 22nd of October, 1910. . . . His Majesty the King does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan.

I am to explain that in 1910 the Rajah of Kelantan with his Majesty's approval assumed the title of Sultan and is now Sultan and Sovereign of the State of Kelantan.

The Sultan in Council makes laws for the Government of the State, and His Highness dispenses justice through regularly instituted Courts of Justice, confers titles of honour and generally speaking exercises without question the usual attributes of Sovereignty.

The House of Lords accepted this statement as conclusive, and held that the Sultan was an independent sovereign over whom the English Courts had no jurisdiction.

It is clear that, from the international point of view, the Sultan's sovereignty was considerably restricted. But his territory had not been annexed, and he still exercised considerable powers of internal sovereignty; and these facts were sufficient to render him independent in the view of the British Government, and therefore for the purposes of English law.

### *Johore.*

A similar point was raised in the English Court in 1893 as regards the Sultan of Johore, when it was also held, following a similar communication from the Colonial Office, that the Sultan was an independent sovereign. At that time, while the Sultan had made over to the British Government 'the guidance and control of his foreign relations,' his powers of internal sovereignty remained practically unimpaired, and it was not until 1910 that a British Agent was appointed to advise him. In 1914, the Sultan agreed to accept a General Adviser, with powers similar to those exercised by British Residents in the Federated Malay States.

*Atiyah v. Sultan of Johore, 1894, 1 Q. B. 149.*

76 S.P. 92.

*Colonial Office List, 1925, p. 429.*

*See p. 205 below.*

### *The Native States of India.*

The protectorates exercised by Great Britain over the native States in India might seem to approximate to those of the earlier type rather than to colonial protectorates, since the relations between the States and Great Britain do not now move towards absorption of the one by the other. But that these protectorates properly belong to the colonial type will appear from an examination of the history of India both in the

years preceding the Mutiny, when annexations were not infrequent, and in the subsequent period, during which the influence and control of the paramount Power have been continually strengthened.

Hbert,  
Ch. II.  
Lee-  
Warner,  
Ch. I.  
Lyall, Ch.  
XIX.

The native States number considerably over six hundred. They are embedded in the regions under full British sovereignty, and they exhibit a wide variety in size and political development. Their present political position may be briefly described as follows.

21 & 22  
Vict. c. 106,  
s. 87.  
Hbert,  
Ch. V.

Their relations with the paramount Power are based in part upon treaties, in part upon usage. Many of the treaties were concluded with the East India Company before the British Government assumed the direct administration of India, and they were made binding upon the Crown by the Government of India Act, 1858. 'The mode or degree,' wrote Sir Henry Maine, in his minute on Kathiawar, 'in which sovereignty is distributed between the British Government and any given Native State is always a question of fact, which has to be separately decided in each case, and to which no general rules apply. In the more considerable instance, there is always some treaty, engagement, or sumnud to guide us to a conclusion, and then the only question which remains is, what has become of the sovereign rights which are *not* mentioned in the Convention?'

Lee-  
Warner,  
Chs. VIII.-  
XII.  
Hbert,  
Chs. II. & V.  
89 S.P.  
1053.

So far as internal affairs are concerned, the native Princes enjoy varying degrees of autonomy, 'But they are all alike in several important connections. They have no political relations with one another, nor relations of any kind with foreign Powers, except through the British Government, and they cannot declare war or make peace. They are guaranteed against attack from without and from internal revolution, and in return they owe certain duties to the paramount Power. They are under an obligation to assist it in time of war to the full extent of their resources, and to regulate the size of their armies in peace time in accordance with its wishes; to submit any disputes that may arise between themselves to the decision of the British Government; to obtain the recognition of that Government to all successions to the chiefships and to accept its ruling in cases of disputed successions; to maintain a certain standard of good government within their States, to suppress any inhuman practices, and to exercise religious toleration. The British Government claims a right to a personal jurisdiction over Europeans, Americans and British subjects in the native States, as well as a territorial jurisdiction over certain

areas therein, such as cantonments, and railways running through the States. It also requires the princes to co-operate with it in regard to other matters, for example, extradition and coinage.

From a municipal point of view, the territories of the native princes are not British territory, nor are their subjects British subjects. In certain respects, such as for the purposes of the Foreign Jurisdiction Act, 1890, their subjects are treated as persons enjoying British protection, and when travelling or residing abroad they are entitled to British protection in the same way as British subjects.

The earliest treaties made by the East India Company with the native States were treaties of commerce or of alliance, and the Indian Government dealt with the States on a footing of equality. Up to 1818, it made treaties very sparingly, and only with the States adjacent to its own territory. Later on, when treaties of protection and subordination were freely entered into, the Indian Government still refrained from interfering in the internal affairs of the native States. Under this policy, a number of instances of misrule on the part of native princes occurred, and the Government then interposed and annexed the misgoverned territories to its own dominions. In this way, Coorg was added to British India in 1834, and Oudh in 1856.

But misrule was not the only ground upon which the Government claimed the right to annex a native State. Under the doctrine of 'lapse' it was held that, when the ruling prince of a subordinate State died without natural heirs, the Indian Government was not necessarily called upon to recognize an adopted heir, and, unless it did so, the territory lapsed or escheated and became part of British India. Instances of such annexations are those of Sattara in 1849, Nagpore in 1853, and Jhansi in 1854. At this period, and especially during the Governor-Generalship of the Marquis of Dalhousie, the British policy had so far changed that it tended in the direction of making annexations of subordinate States whenever a favourable opportunity to do so presented itself. Thus Lord Dalhousie, writing in 1848, with reference, as he afterwards explained, to the 'subordinate States' or dependent principalities in respect of which the British Government had 'the recognized right of a paramount power in all questions of the adoption of an heir to the sovereignty of the State,' enunciated his policy as follows:

*Statham v. Statham and the Gaekwar of Baroda*, 106 *Law Times*, 961.

53 & 54 Vict., c. 37, s. 15.

Pre-Mutiny period. Lee. Warner, Chs. II.-V.

Doctrine of 'lapse.'

H. of C. Papers: 416 of 1864. 431 of 1865. 245 of 1868.

H. of C. Paper, 416 of 1864. p. 36. Lyall, 328.

\* 39 & 40 Vict. c. 48. Lee-Warner, Ch. IX. Dbert, Ch. II. Hall: *Foreign Powers* etc., § 41.

I take this fitting occasion of recording my strong and deliberate opinion that in the exercise of a wise and sound policy, the British Government is bound not to put aside or to neglect such rightful opportunities of acquiring territory or revenue as may from time to time present themselves, whether they arise from the lapse of subordinate states, by the failure of all heirs of every description whatever, or from the failure of heirs natural, where the succession can be sustained only by the sanction of the government being given to the ceremony of adoption according to the Hindoo law.

The Government is bound, in duty as well as in policy, to act on every such occasion with the purest integrity and in the most scrupulous observance of good faith. Where even a shadow of doubt can be shown, the claim should at once be abandoned.

But where the right to territory by lapse is clear, the Government is bound to take that which is justly and legally its due, and to extend to that territory the benefits of our sovereignty, present and prospective.

In like manner, while I would not seek to lay down any inflexible rule with respect to adoption, I hold that, on all occasions where heirs natural shall fail, the territory should be made to lapse, and adoption should not be permitted excepting in those cases in which some strong political reason may render it expedient to depart from the general rule.

. . . I cannot conceive it possible for anyone to dispute the policy of taking advantage of every just opportunity which presents itself for consolidating the territories that already belong to us, by taking possession of states which may lapse in the midst of them.

Post-  
Mutiny  
period.  
Lyall, Ch.  
XIX.  
Lee.  
Warnar,  
Ch. VI.

*Statham v.  
Statham and  
the Gaekwar.*  
106 *Law  
Times*, 992.

After the Mutiny, this policy was deliberately changed. The chiefs were given assurances that their rulerships would be perpetuated, and the adoption of successors allowed on the failure of natural heirs; and the endeavours of the British Government have since been directed towards preventing the States of the native Princes from becoming absorbed into British India, and maintaining them under native rule. If it has become necessary to depose a ruling prince, as was the case in Baroda in 1874, another native ruler has been appointed in his place.

But it does not follow that the ties which bind the native States to the Government of India have not been growing stronger during that time. On the contrary, evidence is plentiful that the British control over the unannexed portions of India has been extended and intensified and rendered more enduring. As examples of such evidence, the following facts may be noticed.

(1) The relations between Great Britain and the native States, which, in the days of the Company, were not considered to be outside the purview of the Law of Nations, are now so close that that Law has no application to them. In 1826, in a Treaty of Friendship and Alliance between the East India Company and the Rajah of Nagpore, the preceding Rajah was said to have made an attack upon the British troops 'in violation of public faith and of the laws of nations.' In 1891, in an announcement published in the official *Gazette* of India, it was stated that :—

Lee-  
Warner,  
Chs. III.  
& V.

H. of C.  
Paper,  
416 of  
1854, p. 3.

The principles of international law have no bearing upon the relations between the Government of India, as representing the Queen-Empress on the one hand and the Native States under the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter.

*Statham v.*  
*Statham &*  
*Anr., u.s.*  
Lee-  
Warner,  
Ch. IV.

(2) The older expression 'alliance' or 'subordinate alliance,' which had been used to describe the relationship between the Government of India and the native States, was replaced in the Interpretation Act 1889 by the term 'suzerainty'—which, as Sir Courtney Ilbert puts it, corresponds more accurately to the existing relations.

Ilbert,  
Ch. III.

(3) While the nature of the relations between the British Government and the native princes has been, and still is, to a large extent left undefined, that very fact has helped to enhance the supremacy of the suzerain and regularize the subordinate position of the native States, by allowing scope for the operation of certain broad principles that have been followed by the British Government. Those principles may be stated as follows: The body of treaties in existence between the British Government and the native princes must be read as a whole, and general rules laid down for one of the princes apply to all of them; so that, when the provisions relating to such matters as military policy, the suppression of inhuman practices, the claims of the paramount Power to co-operation, or its rights of interference, have been revised in the case of any one State, that revision is to be taken as extending to them all.

Lee-  
Warner,  
Ch. II.

Thus, while the territories of the protected Princes have, in a physical sense, been gradually connected more and more closely with British India by an ever-growing network of roads, railways and telegraphs, the political ties which connect the protected States to the suzerain Power have been continuously multiplied, developed, and strengthened. The process has not

been directed towards annexation, because the British Government, as a matter of settled policy, has adopted the method of controlling the internal administration upon broad lines, instead of carrying it out directly as in the surrounding territory. Still the States form, and are recognized by the members of the International Family as forming, component parts of the empire which embraces the whole of India; and, enjoying in that position a considerable amount of freedom in regard to internal affairs, they occupy a unique position among protectorates of the colonial type.

*Comparison of the Indian with the African Protectorates.*

A comparison of the Indian protectorates with those which, later on, were set up by the European Powers in Africa shows that, while in many respects they differ widely, in others they exhibit a good deal of similarity. In both cases they have formed an important feature of the process by which the extension of European sovereignty has been effected.

The peoples with whom the British came into contact in India were considerably more advanced and powerful than the natives of Africa; the local Governments were of a more highly developed type; the opposition to be overcome was more formidable; and the military operations were more serious undertakings. These conditions had their influence on the course of the relations between the Company and the native princes, and their effect is seen in the structure of the earlier treaties, which were mostly treaties of alliance and friendship as between equals. The later treaties, however, approximated more closely to the type common in Africa; and if we take a broad survey of the two systems of protectorates as they stand at present, several important points of resemblance emerge.

In both cases, the external sovereignty is always completely under the control of the protecting Power, while the internal sovereignty is divided between that Power and the local authority in proportions which vary from one extreme where, as in the case of Hyderabad or Zanzibar, almost all the internal sovereignty is left to the native Government, to the other extreme where, as in parts of Kathiawar or in the Bechuanaland Protectorate, practically the whole of it has passed from the local chiefs to the protecting Power. In both India and Africa, the tendency has been for the protecting Power to increase its control over internal affairs. In India this has been effected mainly by emphasizing and regularizing the duties which the

Leo-  
Warner,  
Ch. II.

Libert,  
Ch. II.

Danodhar  
Gordhan v.  
Deoram Kanji,  
1 A. C. 332.  
R. v.  
Crewe 1910,  
2 K. B.  
576.

native princes owe to the paramount Power ; in Africa by more direct action in the various branches of administrative government.

Annexations of protected territory have taken place in India as in Africa. In Africa, the process of appropriating more and more of the internal sovereignty of the protected countries on the part of the various European Powers has been repeatedly marked by annexations. In India, owing to the fact that only one European Power is concerned, and the territories under its protection are closely intermingled with the regions under its complete sovereignty, it has been possible to frame and carry out a policy for the protectorates as a group, and so to bind together the protectorates and the annexed territory into a coherent whole, within which good government can be secured, and the rule of Great Britain over the whole peninsula assured, without proceeding to further annexations.

#### *Afghanistan.*

The pre-War British protectorate over Afghanistan is another case which might, from the fact that it existed from 1879 to 1921 without any approach towards annexation being made by the British Government, and was then abandoned, appear to furnish an exception to the general rule that a modern protectorate presages, and is recognized as presaging, closer control by the protecting Power with the possibility of annexation in the more or less distant future. But, here again, the preservation of the country as an independent State was the avowed object of British policy, the aim of which was the retention of a buffer State between India and the Russian Empire in Central Asia ; and the protectorate was established in pursuance of the firm intention of the British Government to keep Afghanistan exclusively under British influence. Even so, however, it was recognized that the position which Great Britain held marked her out as the only European Power which was entitled, as against the rest, to take measures which might lead up to annexation.

In the early 'seventies of the last century, Russia had acknowledged Afghanistan to be a British 'sphere of influence,' and had intimated that, if Great Britain found it to her interests to annex the country, she would offer no objection. In 1878, however, Great Britain had to declare war upon Afghanistan to prevent the Amir from entering into a treaty of alliance with Russia, the declaration of war stating that the British Government would tolerate no interference on the part of any other

66 S.P.

1099 ;

1101.

69 S.P.

332 sq. ;

815.

Lyall, 307.

Power in the internal affairs of Afghanistan. About the same time the Russian Government was informed that, although Great Britain could not regard the maintenance of the independence of the country as a matter of engagement towards Russia, that was the aim of her present policy.

70 S.P. 50.

By the Treaty of Peace of the 26th May, 1879, the Amir agreed to conduct his relations with foreign States in accordance with British advice and wishes, and to enter into no engagements with, nor take up arms against, any foreign State except with the concurrence of the British Government. On these conditions, Great Britain promised to support the Amir against any foreign aggression with money, arms, or troops, at the same time agreeing that the British agents should not interfere with Afghan internal administration. The Amir was also to receive an annual subsidy. The important provisions of this treaty, with some comparatively slight modifications, formed the basis of the arrangement entered into in 1880 with the succeeding Amir, Abdurrahman.

Martens,  
2nd Series,  
34, pp. 641 sq.  
95 S.P.  
1042 sq.

Ca. 3763  
(1907).  
100 S.P.  
567.

These arrangements established the pre-eminent position of Great Britain in regard to Afghan affairs; and the terms of the provisions in the Russo-British Treaty of the 31st August, 1907, by which Great Britain undertook, under conditions, not to annex Afghanistan, show that Russia recognized that position. In that Treaty, the British Government declared that they had 'no intention of changing the political status of Afghanistan.' But the British engagement 'neither to annex nor to occupy . . . any portion of Afghanistan or to interfere in the internal administration of the country' was made conditional upon the Amir's fulfilling 'the engagements already contracted by him towards His Britannic Majesty's Government.' The Russian Government, on their part, agreed to conduct all their political relations with Afghanistan through the British Government.

Curzon:  
*Frontiers*,  
39 sq.  
*The Times*,  
8-11, Aug. 1919.  
Cmd. 1786  
(1922).  
114 S.P. 174.

The pre-War relations between the Afghan State and her protector, and the stationary condition of those relations, are readily explained as due to the peculiar geographical and strategical position of the country, and to the British policy, which has played so important a part in the building up of the British Empire in India, of maintaining a friendly but independent belt between British India and the territory of a powerful neighbour. In the altered conditions left by the Great War, Great Britain, in her Treaty with the Afghan Government of the 22nd November, 1921, recognized in that Government 'all rights of internal and external independence.'

*Consequences of the establishment of a Protectorate.*

The examples given above will serve to show to what a wide variety of cases, and under what a great diversity of conditions, the protectorate has been applied in modern times. The necessary and sufficient condition for the setting up of a protectorate is the conclusion of an agreement with the local independent government or chief by which the external relations of the district to be protected are placed in the hands of the protecting Power. To this extent, the modern colonial protectorates correspond with the protectorates of the older types. The distinguishing feature of the colonial protectorate is, however, as we have noticed, its recognition as a step, or a possible step, in the long-drawn-out process by which it has been customary for the Powers to extend their control and dominion in recent times.

But while modern International Law allows to the protecting Power the sole right, as against other Powers, of taking steps leading towards the annexation of the protected territory, it is to that Power that it looks to ensure the existence of an efficient administration there within a reasonable time after the establishment of the protectorate.

The tendency is for the protecting Power to assume more and more of the responsibility for the administration of the protected territory, and this may go on until the entire control over internal affairs is in its hands and the administration is carried on in its name. But even when both the internal administration and external affairs are controlled entirely by the protecting Power, so long as no formal annexation has been proclaimed, the territory does not in law form an integral part of the dominions of the protecting Power; the native inhabitants are not nationals of that Power, although they are entitled to its protection when in foreign countries; and treaties between the protected Government and third Powers remain in force.

In the case of the Tunisian and Moroccan Nationality Decrees which was before the Permanent Court of International Justice in 1922-3, France contended

that the public powers (*puissance publique*) exercised by the protecting State, taken in conjunction with the local sovereignty of the protected State, constitute full sovereignty equivalent to that upon which international relations are based, and that therefore the protecting State and the protected State may, by virtue of an

*See*  
Ch. XIX.  
*above.*

F.O. Hand-  
book, No.  
90, p. 1.  
Jenkins,  
101-3.

R. v. *Cress*,  
p. 188  
*above.*

*See* Ch.  
XXXIX.  
*below.*

*See* Ch.  
XXXII.  
*below.*

Advisory  
Opinion,  
No. 4.  
*See also*  
Ch. XXXI.  
*below.*

agreement between them, exercise and divide between them within the protected territory the whole extent of the powers which international law recognises as enjoyed by sovereign States within the limits of their national territory.

Great Britain would not assent to this proposition, which, it may be noticed, is at variance, for example, with the principle (which we shall consider in Chapter XXXII) that, while the annexation of backward territory has the effect of bringing automatically to an end extritorial privileges previously enjoyed there by other Powers, the mere establishment of a protectorate has not that effect. The Court did not find it necessary to decide for or against the proposition, but it observed that it would

be necessary to have recourse to international law in order to decide what the value of an agreement of this kind may be as regards third States.

*Protectorates are frequently assimilated to National Territory.*

Protectorates are often treated for various purposes as if they formed part of the territories of the protecting Power. For example, the Air Navigation Convention of the 13th October, 1919, provides that the territories and nationals of protectorates or of territories administered in the name of the League of Nations shall, for the purposes of that Convention, be assimilated to the territory and nationals of the protecting or mandatory States.

Great Britain, for some purposes, treats her protectorates of the African type as if they were Crown Colonies. Thus, although at first she so far regarded them as foreign territory as to claim jurisdiction within them only over British subjects, and required the consent of a foreign Government to the exercise of jurisdiction over its subjects therein, in later cases she has assumed jurisdiction over all persons within the protectorate, irrespective of their nationality; and, in proceeding by way of Order in Council for this purpose, she has treated protectorates as if they were ceded or conquered territory.

In some cases, a colony and an adjacent protectorate are administered together, and laws of the colony are applied to the protectorate. Thus, for example, Kenya Colony and Kenya Protectorate have the same Governor, Executive Council and Legislative Council. Further, the British Parliament has in

112 S.P.  
942.

British  
Protectorates.  
Anson, II.  
II V. v. § 2.  
See Ch.  
XXXI. below.

See e.g.,  
95 S.P. 908.  
See R. v. Crewe,  
1910, 2 K.B. 628.  
Hall: Foreign  
Powers, § 98.  
113 S.P. 174.  
See also  
108 S.P. 84  
(Nigeria).

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certain cases, as in the Copyright Act, 1911, and the Maritime Conventions Act, 1911, legislated for all territories under His Majesty's protection as if they formed part of His dominions.

The question whether the Federated Malay States could be regarded as a British colony for the purposes of the Anglo-Persian Commercial Convention of February, 1903, was raised in 1904. The British Minister informed the Persian Government that the States were under the control of the British Colonial Office, and that the administration of justice, of the armed forces, of the posts and telegraphs, and of finance, the railways and public instruction, was in the hands of British officials; while, at the same time, political authority over the native population in each district or State was exercised by a Council presided over by the native chief, and composed of the principal sub-chiefs and other important personages of the locality.

The Persian Government agreed that, in these circumstances, the Federated Malay States should be regarded as possessing the character of a British colony for the purpose in question, but made the reservation that the same principle could not be considered as applicable to 'États placés sous un régime de protection mitigée ou d'intervention diplomatique, notamment à l'Afghanistan et aux États Arabes de la côte méridionale du Golfe Persique.' In March, 1920, by an exchange of Notes between the British and Persian Governments, it was agreed that the expression 'British Empire' where used in the Convention of February, 1903, should include territories under British protection or administration.

The French Protectorates have all been transferred at various times from the Foreign Office to the Colonial Office, with the exception of Tunisia and Morocco, which are still administered by the Foreign Office, and Northern Algeria, which is treated as part of the mother country. France has also all along assumed jurisdiction over the nationals of foreign Powers within her protectorates; and the French Military Law of 1905 provided that young Frenchmen residing in French protectorates should be enrolled there, instead of in France, for military service.

The German possessions were all referred to as *Schutzgebiete*, or protected territories; but this arose out of the historical development of German colonial policy and the form of the German constitution, and the German 'protectorates' were,

\* E.g., Annam (1884), Martens' *Recueil*, 2nd Series, 12, p. 335.

1 & 2 Geo. V.,  
Ch. 46, s. 28.  
1 & 2 Geo. V.,  
Ch. 57, s. 9.

**Federated  
Malay  
States.**  
98 S.P.  
1145.

113 S.P.  
370.

**French  
Protectorates.**  
Lucas,  
125 & 6.  
Girault, I.,  
§ 105.  
Reinach, 22.

\* Hall:  
*Foreign  
Powers*, § 64.  
*Jl. du Dr.  
Int. Privé*  
32, p. 386.

**Ex-German  
Protectorates.**  
F.O. Hand-  
book, No.  
42, p. 92.  
Hall, *u.c.*

Libert, Ch. V.  
Snow, Ch. V.

79 S.P. 652. for most purposes, treated as if they were German territory. Germany, too, assumed jurisdiction over foreigners in her protected territories; and, by the German Law of the 15th March, 1888, respecting jurisdiction in German-protected territory, the protectorates were to be considered as German territory for the purposes of the acquisition and loss of German nationality.

## CHAPTER XXIV.

### SPHERES OF INFLUENCE AND INTEREST.

THE step preceding the establishment of Colonial Protectorates in the modern process of territorial acquisition has frequently been the conclusion of an agreement between the Powers who were extending their dominion in districts adjacent to one another, by which each party has agreed to recognize a certain area as within the exclusive 'sphere of influence' or 'sphere of action' of the other. The term 'sphere of influence' is, however, used in several different senses, and it will be well, before proceeding, to distinguish between them.

Varieties  
of 'spheres  
of in-  
fluence.'

(1) In the first place there are conventional areas of the kind to which we have just referred, in which the sphere is a comparatively large one, and embraces the territories of a number of chiefs, which it is open to the influencing Power to acquire by treaty, and perhaps also areas which are properly *territorium nullius* and susceptible of Occupation. The agreement between the Colonial Powers merely amounts to a promise on the part of each of the parties to it to abstain from doing anything that might lead to the acquisition of sovereign rights within the sphere allotted to the other.

(1) Set up  
over an  
unorgan-  
ized area  
by  
agreement  
between  
the  
colonizing  
Powers  
them-  
selves.

(2) The agreement between the Colonizing Powers may recognize that one of them possesses a special interest in the territory, or some definite part of the territory, of a single third State. This is sometimes called a 'sphere of interest' instead of a 'sphere of influence.'

(2) Over the  
territory of a  
third State by  
agreement be-  
tween coloniz-  
ing Powers.

(3) An interest in a part of the territory of a somewhat advanced State may be based upon an arrangement made with that State itself,—for instance, in the form of an undertaking on the part of the State not to dispose of the territory, or not to dispose of it to any State except the interested Power. Such an arrangement is sometimes said to create a 'sphere of influence' or 'sphere of interest.'

(3) Over the  
territory of a  
third State by  
agreement  
with that State.  
Cuvier:  
*Frontiers*,  
p. 46.

(4) By such principles as those of 'contiguity' or 'necessity.'

(4) The term has been applied to unappropriated areas which adjoin, or are economically, politically, or strategically important to, territory already in the possession of a State. Here, there is no question of any international agreement.

We will consider these four classes in order.

(1) Spheres of influence over large unorganized areas by agreements between Colonial Powers.

Spheres of influence of Class (1) date chiefly from 1885.

82 S.P. 43.

A considerable number of spheres of influence of Class (1) have been delimited by the European Powers in Africa and Oceania since 1885. The nature of the engagements entered into can be readily gathered from the phraseology in which the reciprocal promises are couched. This is usually in some such form as the following, which occurs in the important Treaty made between Great Britain and Germany in 1890 relating to their respective spheres of influence in several parts of Africa. In that Treaty, each of the Powers agrees that it 'will not in the sphere of the other make acquisitions, conclude Treaties, accept sovereign rights or Protectorates, nor hinder the extension of influence of the other.'

But the principle is of considerable antiquity. See Ch. IV. above.

But although the term 'sphere of influence' is of comparatively modern origin, the condition of affairs which it connotes has been set up at various periods in the history of colonial expansion. We have already seen that what a State gained under the papal grants, or in virtue of discovery, amounted to exclusive rights, as against other European Powers, to set about the acquisition of a particular territory by the method appropriate to its condition. Similar rights, as between the Powers concerned, also had their origin in agreements between the Powers themselves, long before the modern period of conventional spheres of influence was entered upon.

Spain and Portugal in the fifteenth century.

Thus the principle of marking off, by mutual agreement, regions within which each of the contracting parties should be left free to pursue its colonizing activity unhampered by the competition of the other was practised by the Crowns of Castile and Portugal in the fifteenth century.

Percott: Ferdinand & Isabella, I. XVI.

By one of the provisions of the Treaty of 1479 between those nations, the right of traffic and of discovery on the west coast of Africa was reserved to the Portuguese, who resigned all claims on the Canary Islands to Castile—by which State the last of the Islands was conquered in 1495.

ib. I. XVIII.

After the discoveries of Columbus, the Treaty of 1479 was found to be inadequate to prevent clashing between the two

nations in the wider field opened to them, and King John the Second of Portugal suggested to the Spanish Court that they should agree together to make the parallel of the Canaries the boundary line between the regions in which each should recognize the exclusive right of discovery of the other, the field of the Spaniards to be to the north, and of the Portuguese to the south, of that line. This proposal was not, however, regarded favourably by Ferdinand and Isabella; and by the Treaty of Tordesillas of 1494, following the precedent set in the papal bulls, the line was drawn from north to south instead of from east to west.

See Ch.  
XVII.  
above.

By Article VII of the Treaty of Paris of 1763, the boundary between the American possessions of England and France was fixed as the middle line of the River Mississippi. The French king ceded to His Britannic Majesty (with an exception) 'tout ce qu'il possède, ou a dû posséder, du Côté gauche du Fleuve.' 'Great Britain, on her part,' to use the words of Chief Justice Marshall, 'surrendered to France all her pretensions to the country west of the Mississippi. It has never been supposed that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquire the country; and any after attempt to purchase it from the Indians, would have been considered and treated as an invasion of the territories of France.'

The Treaty  
of Paris.

Martens  
Recueil,  
1st Series,  
2nd Edn.  
I. at 110.

Johnson  
v. M'Intosh,  
8 Wheat.  
Reps. at  
583.

Some of the provisions of the Treaty of 1824 between Great Britain and the Netherlands might, but for the absence of any reference to 'protectorates' or 'influence,' have been taken from a treaty of the latest period. By Article 10 :—

Great  
Britain and  
the Nether-  
lands in  
1824.

His Netherlands Majesty engages, for Himself and His Subjects, never to form any Establishment on any part of the Peninsula of Malacca, or to conclude any Treaty with any Native Prince, Chief, or State therein.

11 S.P. 101.

And by Article 12 [and Article 9] :—

His Britannick Majesty, however, engages, that no British Establishment shall be made on [the Island of Sumatra], the Carimon Isles, or on the Islands of Battam, Bintang, Lingin, or on any of the other Islands South of the Straights of Singapore, nor any Treaty concluded by British Authority with the Chiefs of those Islands.

But it was not until after the Berlin Conference that the modern era of conventional spheres of influence properly began. In the Final Act of that Conference, the fact that territory

The modern  
era following  
the Berlin  
Conference.  
Arts. 6 & 9.

*Fitzmaurice* might be under the influence, as distinct from the protection or sovereignty, of a Power was for the first time formally recognized; although the term 'sphere of influence' had been used ten years earlier in the Anglo-Russian negotiations with regard to Central Asia.

*Great Britain and Germany in Africa. But see* The arrangement entered into in May 1885 by Great Britain and Germany for separating and defining their 'spheres of action' in portions of Africa should, perhaps, be regarded as the first one characteristic of the modern period.

*78 S.P. 772. C.-4442 (1885).* Great Britain engaged 'not to make acquisitions of territory, accept Protectorates, or interfere with the extension of German influence in that part of the coast of the Gulf of Guinea, or in the interior districts to the east of 'a defined line. Germany entered into a similar engagement in regard to the districts to the west of the line extending to the British colony of Lagos; and also undertook to refrain from making acquisitions of territory or establishing Protectorates on the coast between the Colony of Natal and Delagoa Bay. Each Power also agreed 'to withdraw any Protectorates already established within the limits thus assigned to the other.'

*1885 and onwards. 76 S.P. 303.* This arrangement was soon followed by others of a similar nature. On the 24th December of the same year, France and Germany agreed upon the lines that were to divide the German Cameroons from the French Gaboon, and Togo from Dahomey. The following year (1886) saw agreements between Great Britain and Germany with reference to the Western Pacific, (April), the Gulf of Guinea (August), and East Africa (November); while France and Portugal delimited their respective spheres in West Africa (May), and Germany and Portugal in South-west and South-east Africa (December).

*E.g. 82 S.P. 35. 83 S.P. 10, 20 & 27. 88 S.P. 10, & 974. 76 S.P. 303.* Numerous arrangements of this kind were subsequently made, and played a very important part during the latest period of colonial expansion. They were entered into—to generalize a statement in the preamble of the Franco-German Agreement of December 1885—with the object of regulating, in a spirit of mutual good-will, the relations which might result between the contracting Powers from the extension of their rights of sovereignty or protectorate in neighbouring regions. It was largely owing to their use that, despite the keen competition among the Powers for territory in Africa and Oceania, the primary division amongst them of those parts of the world was effected by peaceful methods. Difficulties were anticipated and avoided by the exercise of an accommodating spirit on

*The value of these arrangements.*

both sides; and force, which loomed so largely in the colonial settlements of the eighteenth century, gave place to agreement.

*The legal effect of these Arrangements.*

Conventions for delimiting spheres of influence have thus served a useful and beneficent end. What is their legal effect?

(i) *As regards Native Sovereigns.*

In the first place, the rights of the native sovereigns within the spheres so set up are not affected by the Agreement. Thus, when the Sultan of Zanzibar objected that part of the region in South East Africa allotted to Portugal by the Agreement between that country and Germany of the 30th December, 1886, had already been recognized by Germany and Great Britain to belong to Zanzibar, the German Government replied that their arrangement with Portugal did not affect the Sultan's rights. 'It merely,' they said, 'provided that the Imperial Government would not interfere with regard to any arrangements which the Portuguese Government might come to with the Sultan or others as to territory lying beyond the sphere of German interests.'

78 S.P.  
1264-5.

(ii) *As regards the Parties.*

Each of the parties to an arrangement of this kind is, of course, under a legal duty to refrain from interfering where it has promised to leave the other a free hand. The obligation is to abstain from political action which might be regarded as a step towards the acquisition of sovereignty. For example, in the Anglo-German Treaty of the 1st July, 1890, and the Anglo-Portuguese Treaty of the 11th June, 1891, it was declared that 'no Companies nor individuals subject to one Power can exercise sovereign rights in a sphere assigned to the other, except with the assent of the latter.'

See the  
'Sergent  
Malamina'  
Award,  
96 S.P. 141.

82 S.P. 43.  
83 S.P. 32.

Activity of a purely commercial or industrial nature by subjects of one of the Powers in the sphere of the other is not, however, a violation of the treaty. Thus, in reply to the German enquiry whether Great Britain would wish any trading-stations that had been established by the German East Africa Company within the British sphere to be withdrawn, Lord Salisbury said that, in his opinion, 'it was not the intention of either Government to restrict the subjects of the other from *bond fide* trading operations within the sphere assigned to it.

Com-  
mercial  
and in-  
dustrial  
activity not  
excluded.

78 S.P.  
1061.

We shall,' he continued, 'therefore be prepared to admit the principle that German subjects may establish trading-stations in the British sphere, and acquire land necessary for the purposes of such stations, on the understanding that claims to political, sovereign, or exclusive rights, founded on Agreements with native Chiefs or otherwise, are inadmissible, provided that the German Government admit the same principle as regards British subjects in the German sphere.'

(iii) *As regards Third Powers.*

Where an agreement has been concluded between a European Power and a native chief for setting up a protectorate, we have seen that International Law lays upon other States the duty of abstaining from political action within the protected territory. In the case of a protectorate, the right of exclusive control is correlative with the duty of taking steps to provide the region with a reasonably efficient administration. By laying claim merely to a sphere of influence, however, a Power as good as says that it does not intend at the time to undertake the duties which a protectorate entails, and so long as it is not prepared to fulfil the conditions necessary to secure exclusive control, it has no ground for claiming that such a control should be conceded to it.

Third Powers are not affected in law.

77 S.P. 44.  
83 S.P. 31.

View of the United States. 88 S.P. 1287.

It follows that Third Powers are not debarred by law from establishing political relations with, or acquiring, a given territory, merely because that territory has been acknowledged by one Power to be within the sphere of influence of another. Some of the treaties have contained an express provision that the rights of third parties are not to be affected by them. For example, the Anglo-German Agreement of the 6th April, 1886, and the Anglo-Portuguese Treaty of the 11th June, 1891, each had a clause to that effect. But such a provision is superfluous.

'Spheres of influence,' said the United States Secretary of State in 1896, in connection with the Venezuelan boundary dispute, 'and the theory or practice of the "Hinterland" idea are things unknown to international law, and do not as yet rest upon any recognized principles of either international or municipal law. They are new departures which certain great European Powers have found necessary and convenient in the course of their division among themselves of great tracts of the Continent of Africa, and which find their sanction solely in their reciprocal stipulations. . . . Whether the "spheres of influence" and the "Hinterland" doctrines be or be not intrinsi-

cally sound and just, there can be no pretence that they apply to the American continents or to any boundary disputes that now exist there or may hereafter arise.'

So far, then, as the effects of an agreement for delimiting spheres of influence extend beyond the parties to it, they are political rather than legal. In Hall's words, 'the understanding that a territory is within a sphere of influence warns off friendly powers; it constitutes no barrier to covert hostility.' It would be an unfriendly act for another Power to endeavour to set up a protectorate within the sphere, and especially to try to oust the Power claiming the sphere from any area in which it was positively exerting influence. But if the influencing Power wishes to obtain the lowest form of title that International Law will recognize, it must advance to the stage of a protectorate, and assume the responsibilities which that relationship entails.

As instances in which arrangements for spheres of influence have been disputed by third Powers, the following cases may be quoted.

*Great Britain and Portugal in Central Africa.*

Portugal claimed exclusive rights over a wide strip of Africa extending entirely across the continent, and obtained the recognition of France and Germany to those pretensions by the Treaties of the 12th May, 1886, and the 30th December, 1886, respectively. By those Treaties, France and Germany separately acknowledged 'the right of His Most Faithful Majesty to exercise his sovereign and civilizing influence in the territories which lie between the Portuguese possessions of Angola and Mozambique, without prejudice to any rights that may have been hitherto acquired therein by other Powers,' and both these Powers agreed to abstain from making acquisitions in the region so defined.

On the publication of these Conventions, Lord Salisbury took exception to the Portuguese claim to reserve to her enterprise 'the immense field . . . lying between Angola and Mozambique.' In part of the district there were, he said, countries containing British settlements, and others in which Great Britain took an exceptional interest. On the other hand, in the greater part of the region there was no sign of Portuguese jurisdiction or authority; and he refused to recognize any claim to sovereignty which was not based upon a real occupation.

Portugal, while admitting that the recognition and engagements of France and Germany were not binding upon other

The importance of spheres of influence to third Powers is political.  
Hall: *Foreign Powers, etc.*, § 101.

See also Ch. XIX. *above*.  
F.O. Hand-books, No. 96, pp. 13 *sq.*  
No. 120, pp. 21 *sq.*  
77 S.P. 519 & 604.

79 S.P. 1062-3.

79 S.P. 1069 & 1062.

Powers, maintained that they gave her a legal title to the territories in question. 'The very great interest,' said the Portuguese Foreign Minister, 'which both those Powers are already taking at the present day in the future aggrandizement and civilization of the African Continent, give to these deliberations so important a meaning and establish our title in such a manner that, in the opinion of the Government of His Most Faithful Majesty, the title in question can, on grounds of the greatest justice, even were others lacking, be invoked before other nations as legalizing our dominion and sovereignty over the regions in question.'

The British Government, however, refused to acknowledge any such title. On the 11th February, 1888, a Treaty concluded with Lo Bengula gave Great Britain exclusive control over the external relations of Mashonaland and Matabeleland which were included in the area covered by the French and German Treaties; and Lord Salisbury declared that Lo Bengula had no idea of, and would decline to admit, any claim by Portugal to any part of his territories.

Under the pressure of an ultimatum from Great Britain, an Agreement between the two Powers was signed on the 20th August, 1890, recognizing a British sphere of influence between the Portuguese spheres in East and West Africa, and settling the boundaries between the British and Portuguese spheres. The Agreement met with considerable opposition in Portugal, chiefly because it provided that Portugal should not cede territory within her sphere to any other Power without the consent of Great Britain. This resulted in the resignation of the Portuguese Cabinet by whom the Agreement had been negotiated, and it was never ratified. But by a somewhat modified Treaty, which was signed on the 11th June, 1891, Portugal finally renounced her claim to much of the territory that France and Germany had agreed to recognize as within her sphere of influence.

*Great Britain, France, and Germany in the Soudan.*

Scotti Keltie  
300 2.

Again, in the course of the extension of British, German, and French influence in the neighbourhood of Lake Chad, France declined to concur in an arrangement for a German sphere of influence to which Great Britain and Germany were parties. By this arrangement, which was entered into on the 15th November, 1893, the region comprising the basin of the River Shari, and stretching from the British sphere on the

86 S.P. 41.

Niger to the Nile Valley, was recognized to be under the influence of Germany 'in respect to her relations with Great Britain.' But French expeditions were operating in the sphere so reserved to Germany, and, by the Franco-German Treaty of the 15th March, 1894, the boundary between the French Congo and the German Kamerun was drawn in such a way as to leave to France the greater part of what had been recognized as the German sphere.

88 S.P. 974.

*Great Britain and France in the Nile Valley.*

In the Anglo-French controversy with regard to the valley of the Upper Nile, to which we have already referred in Chapter VI, France took up a position similar to that which Great Britain had adopted a few years previously in her discussion with Portugal, while Great Britain receded from that position, and at first claimed that considerable importance attached to the existence of a mere sphere of influence. But she was glad to strengthen her claims by reference to the dormant rights of Egypt, and, after the battle of Omdurman, to fall back upon a title based upon the recovery of those rights by conquest.

F.O. Handbook, No. 99, p. 35.

The relevant facts in that case were as follows :—

By the Anglo-German Treaties of the 1st July, 1890, and the 15th November, 1893, and the Anglo-Italian Treaty of the 24th March, 1891, the valley of the Upper Nile had been recognized as a British sphere of influence. Later, it was found that the Independent State of the Congo had sent a large force into those districts; but by the Agreement of the 12th May, 1894, King Léopold recognized the British sphere of influence as laid down in the Anglo-German Treaty of 1890, and accepted from Great Britain a lease of a large tract of territory within that sphere, 'to be by him occupied and administered' under certain conditions and for certain periods. By an exchange of notes bearing the same date as the Agreement, Great Britain and King Léopold declared that they did not 'ignore the claims of Turkey and Egypt in the basin of the Upper Nile.'

82 S.P. 35.  
85 S.P. 41.  
83 S.P. 19.C.-9054  
(1898), 17.86 S.P.  
19 sq.  
C.-7390  
(1894).

To this arrangement France took exception. Among other objections, the French Foreign Minister referred to 'the difficulty of understanding how it is possible for anyone to give a lease of territories over which he possesses no right of sovereignty or ownership.' 'Great Britain,' he added, 'has never effectively occupied the leased territories, and has never established her authority over them. From that point of view again the

C.-9054  
(1898),  
pp. 15 sq.

stipulations of Article II [which granted the lease] are devoid of all legal or practical basis.'

Great Britain rejoined that the British sphere of influence had been recognized by Germany and Italy; and contended that Her Majesty's Government might, in pursuance of their rights thus recognized, which had, moreover, been publicly announced and hitherto uncontested, legitimately assign 'to the Sovereign of a neutral State the temporary privilege of effective occupation of certain territory within the British sphere.'

90 S.P.  
1278.

Under the pressure of the French objections, the Congo State agreed to renounce all occupations and to abstain from political action of any sort in the greater part of the area covered by the lease.

C.-9054  
(1898),  
pp. 17 *eg.*

In the House of Commons in March 1895, Sir Edward Grey was not content to rely only upon the claims which Great Britain put forward under the German and Italian Agreements—which, he said, had been before the world for five years, had been recognized by the Congo State, and had not been disputed by any other Power. He referred also to the claims of Egypt. But even with this two-fold basis for the British title, he was unable to put it any higher than to characterize the possible advance of a French expedition into the British sphere as an unfriendly act. France again objected, the French Foreign Minister referring to the Anglo-German Treaty as 'one of those annexations on paper which an enterprising diplomacy afterwards cultivates as germs of a future claim and title.'

C.-9055  
(1898).

There the matter stood when, in September 1898, the British and Egyptian troops under General Kitchener defeated the Khalifa at Omdurman. The meeting, shortly afterwards, of General Kitchener with Major Marchand and a small French force at Fashoda brought the Anglo-French discussion to a head. Major Marchand had taken possession, by order of his Government, of a portion of the territory which had been included in the Anglo-Congolese lease of 1894. General Kitchener hoisted the Egyptian flag not far from the French flag at Fashoda, and the dispute was referred to the Governments at home.

The French Government maintained that the region, having been abandoned by the Egyptian Government, had become *res nullius*, and might be occupied by France.

Lord Salisbury met the contentions in part by referring to the British sphere of interest. But he did not put that sphere upon the level of a legal title; and he based his arguments

chiefly upon the rights of Egypt to the banks of the Nile. The Egyptian title, he said, which had been rendered dormant by the military successes of the Mahdi, had been completely revived by the victory of Omdurman, and no third party had a right to claim that the disputed land had in the meantime become derelict.

The matter was finally settled by the declaration of the 21st March, 1899, by which the dividing line between the spheres of influence of the two Powers was drawn in such a way as to leave the Nile Valley to Great Britain, while Wadai went to France. 91 S.P. 55.

*The Influencing Power acquires a Legal Title by assuming the duties of administration.*

Experience has shown that the Powers whose spheres have been delimited by international agreement have not been slow to strengthen their position within their spheres. Agreements have been made with the local chiefs, the organization of the government has been taken in hand, and the duties which devolve upon a Protecting Power gradually assumed, and in this way the shadowy privileges pertaining to a sphere of influence have been transformed into a title which is valid by International Law.

(2) *Spheres of Influence in the territory of a single third State by Agreement between Colonial Powers.*

The spheres of influence or interest which have been established by express international agreement within the territory of some single third State have been set up chiefly in Asia. In some instances, as in the case of Great Britain in Afghanistan and Japan in Corea, the whole of the territory of the third State has been included within the sphere of one of the contracting Powers. In other cases, as with Great Britain and France in Western and Eastern Siam respectively, and with Great Britain and Russia in Southern and Northern Persia, the two Powers have taken spheres in different parts of the territory. The immediate or ostensible object of these arrangements has frequently been the delimitation of areas within which the industrial enterprise of one of the contracting Powers may be exercised unhampered by the other. In other cases, political objects have been openly avowed.

Martens,  
2nd Series,  
32, p. 38;  
and  
97 S.P. 53.

*Japan in Corea.*

The international steps by which Corea was changed from a Japanese sphere of interest into an integral portion of the Japanese Empire merit somewhat detailed notice. In the  
 87 S.P. 799. Peace Treaty of the 17th April, 1895, between China and Japan, China had recognized definitely 'the full and complete independence and autonomy of Corea.' Japan's special commercial and industrial position in Corea was recognized by  
 92 S.P. Russia in the Arrangement of April, 1898; and in the Anglo-  
 1068. Japanese Agreement of January, 1902, the High Contracting  
 96 S.P. 83. Parties placed on record that Japan was 'interested in a peculiar degree politically as well as commercially and industrially in Corea.' In all these cases, the independence of Corea was expressly acknowledged.

Japan proceeded to strengthen her hold over Corea, and to establish her position by direct agreements with the Korean Government.

98 S.P. 842. In February 1904, Corea agreed to adopt the advice of Japan in regard to improvements in administration, and to allow Japan to occupy strategic positions in Corea if such a course should become necessary for the protection of the Imperial House of Corea or of the territorial integrity of that  
 17. 843. country. In August of the same year, Corea agreed to employ a Japanese financial adviser, and a foreign diplomatic adviser to be nominated by Japan; and to consult the Japanese Government when concluding international agreements 'granting special rights to individual foreigners and so forth.' In the  
 17. 411 & following April, Corea assigned to Japan the control of her  
 1138. postal, telegraph and telephone services.

17. 137. The altered position was recognized in the Anglo-Japanese  
 17. 736. Treaty of August 1905, and in the Russo-Japanese Treaty of Peace of the same month, in broadly similar terms. The relevant Article in the British Treaty reads as follows:—

Japan possessing paramount political, military, and economic interests in Corea, Great Britain recognizes the right of Japan to take such measures of guidance, control, and protection in Corea as she may deem proper and necessary to safeguard and advance those interests, provided always that such measures are not contrary to the principle of equal opportunities for the commerce and industry of all nations.

17. 139. 'The new Treaty,' said the British Foreign Minister in explaining this Article, 'no doubt differs at this point con-

spicuously from that of 1902. It has, however, become evident that Corea, owing to its close proximity to the Japanese Empire and its inability to stand alone, must fall under the control and tutelage of Japan.'

Thus secured against the risk of outside interference, Japan, in November 1905, obtained from Corea an Agreement, the stipulations of which, it was declared, were 'to serve until the moment arrives when it is recognized that Corea has attained national strength,' by which the 'control and direction of the external relations and affairs of Corea' were placed in Japanese hands, and Japanese Diplomatic and Consular Representatives were given 'charge of the subjects and interests of Corea in foreign countries.' By the same Agreement it was provided that Japan should be represented at the Court of the Emperor of Corea by a Resident-General, and that the Japanese Consuls in Corea should be replaced by Residents. A further Agreement of July 1907 gave the Resident-General control over Korean administration and legislation.

7b. 1140.

101 S.P.  
280.

Two years later the Korean Government delegated to the Government of Japan the administration of justice and the management of prisons in Corea, 'until the system of justice and prison in Corea shall have been recognized as complete.'

102 S.P. 930.

Finally, in August 1910, Corea was annexed to Japan in virtue of a Treaty of Cession from the Korean Emperor.

103 S.P.  
992.  
105 S.P.  
683 *sq.*

*Great Britain and Russia in Persia.*

The spheres of interest which Great Britain and Russia marked out for themselves in the south and north of Persia respectively by the Convention of the 31st August, 1907, would appear, from the wording of the document, to have been intended to be primarily of an economic nature.

Cd. 3753  
(1907).  
100 S.P.  
555.

The Convention recited that the two Governments had engaged to respect the integrity and independence of Persia. It also stated that each of them had, for geographical and economic reasons, a special interest in the maintenance of peace and order in certain provinces of Persia adjoining, or in the neighbourhood of, the Russian frontier on the one hand, and the frontiers of Afghanistan and Baluchistan on the other. The Convention then proceeded to define the areas within which each Power agreed to recognize the paramount interests of the other, leaving a zone between them. The undertaking was in the form that each Power would not, in the area reserved to the other, seek for herself, or support in favour of her own subjects

or the subjects of third Powers, 'any Concessions of a political or commercial nature—such as Concessions for railways, banks, telegraphs, roads, transport, insurance, etc.,' and would not oppose, directly or indirectly, demands for similar Concessions which were supported by the other Power.

102 S.P.  
906.  
103 S.P.  
647.

In informing the Persian Government of the conclusion of the Convention, the Anglo-Russian Note emphasized the point that the two Powers had 'not for a moment lost sight of the fundamental principle of absolute respect of the integrity and independence of Persia.' The Persian Government, in their reply, pointed out that the Convention could, in justice, concern only the two Governments between whom it had been concluded, and stated that 'the Persian Government, in view of the independence of which by the grace of God it is in full possession, considers the full rights and freedom which it enjoys by its absolute independence absolutely free and protected from every possible effect or influence of any kind of Agreement between two or several foreign States regarding Persia.'

103 S.P.  
644 sq.  
*See per*  
Lord  
Curzon,  
Parly.  
Debates  
28.7.13,  
14 H. of L.  
1409.  
*See per*  
Sir E.  
Grey,  
Parly.  
Debates,  
10.8.11.  
29 H. of C.  
1320.

Russia soon assumed very wide powers within her sphere. On account of the disorder existing there, Northern Persia was subjected to what was practically a Russian military occupation. The way in which the rights secured to Russia under the Anglo-Russian Convention were extended was shown in the incidents connected with the appointment, by the Persian Government, of a British officer to organize the gendarmerie for revenue-collecting purposes. Russia objected to the appointment, and the objection was upheld by the British Government upon the ground that, although the appointment did not violate the letter of the Anglo-Russian Agreement, it was contrary to its spirit so far as Northern Persia was concerned.

112 S.P.  
760.  
Cmd. 300  
(1919).

The events arising out of the Great War relieved Northern Persia from Russian encroachment; and the changed conditions were signalized by a friendly Agreement which Great Britain made direct with the Persian Government in August 1919. This Agreement reiterated 'in the most categorical manner' Great Britain's undertakings 'to respect absolutely the independence and integrity of Persia'; and provided for the rendering of British assistance to Persia, including expert advisers for her administrative departments, and officers and munitions for the formation of a force for the establishment and preservation of order.

*France and Spain in Morocco.*

In the same general way, Morocco was divided into French and Spanish spheres of influence—which, in this case, have ripened into protectorates.

By the Franco-British Agreement of the 8th April, 1904, while France declared that she had 'no intention of altering the political status of Morocco,' Great Britain, in return for a somewhat similar undertaking on the part of France with regard to Egypt, recognized 'that it appertains to France, more particularly as a Power whose dominions are continuous for a great distance with those of Morocco, to preserve order in that country, and to provide assistance for the purpose of all administrative, economic, financial, and military reforms which it may require.' The British Government further declared that they would 'not obstruct the action taken by France for this purpose.' 'France,' said the Marquess of Lansdowne in explaining the Agreement to the British Ambassador in Paris, 'although in no wise desiring to annex the Sultan's dominions or to subvert his authority, seeks to extend her influence in Morocco.' A secret Article of the Agreement, however, contemplated the possibility of the contracting Governments 'finding themselves constrained, by the force of circumstances, to modify their policy in respect to Egypt or Morocco.'

The interests which Spain derived 'from her geographical position and from her territorial possessions on the Moorish coast of the Mediterranean' had been specially mentioned in the Franco-British Agreement, and the Spanish sphere of influence in the Rif country in the North of Morocco had been expressly recognized in one of its secret Articles. By a secret Treaty with France of the 3rd October, 1904, Spain adhered to the provisions of the Franco-British Agreement, and the Spanish sphere of influence was delimited. A Franco-Spanish Declaration made at the same time expressly recognized the integrity of the Moroccan Empire under the sovereignty of the Sultan.

The Powers assembled in the Algeiras Conference in 1906, while they laid down in the General Act of the Conference 'le triple principe de la souveraineté et de l'indépendance de Sa Majesté le Sultan, de l'intégrité de ses États, et de la liberté économique sans aucune inégalité,' so far acknowledged the position of France and Spain in Morocco as to depute those countries to assist the Sultan in the organization of the police.

Cd. 1952  
(1904).  
Cd. 6909  
(1911).

101 S.P.  
1053.

Lucas:  
*Partitions*  
*etc. of*  
*Africa*,  
101 p.  
F.O. Hand-  
book, No.  
101.

Martens,  
3rd Series,  
V. 604.

102 S.P.  
432  
& 430.  
98 S.P. 703.

The  
Algeiras  
Con-  
ference,  
24 Hertslet,  
742.  
99 S.P. 141.

102 S.P.  
435.

Following a period of controversy, the special interests of France in Morocco were recognized by Germany in the Franco-German Agreement of the 9th February, 1909.

104 S.P.  
964 *et*.  
Cd. 6970  
(1911).

France next despatched a military expedition to Fez on the plea that French subjects there were in danger. The continuation of the French military occupation was regarded by the German Government as a violation of the Act of Algeciras, and the German warship *Panther* was despatched to Agadir in Southern Morocco in the middle of 1911, the German Government explaining that this step was taken for the protection of German nationals, and that Germany had no intention of acquiring Moroccan territory. An acute controversy ensued, as the outcome of which German recognition of the enhanced position of France in Morocco was purchased by territorial compensations in Equatorial Africa.

The Agadir  
incident.

104 S.P.  
956.

This recognition was contained in the Franco-German Agreement of the 4th November, 1911, by which the German Government, stating that they desired only economic interests in Morocco, undertook not to hinder France from helping the Moroccan Government to introduce administrative, judicial, economic, financial and military reforms, nor to oppose the extension of French control and protection; and France, on her part, entered into certain obligations for assuring equality of opportunity in economic matters.

104 S.P.  
948.  
Martens,  
3rd Series,  
V. 642.

106 S.P.  
1023-42.

The  
French and  
Spanish  
Protector-  
ates.  
Permanent  
Court  
Advisory  
Opinion  
No. 4.

Thus secured against European intervention, France was able to induce the Sultan to accept a French Protectorate, and a considerable measure of French internal control, in March, 1912—an arrangement which, according to the French contentions before the Permanent Court of International Justice in the case of the Nationality Decrees, 'fait du Maroc (zone française) un territoire étroitement assimilé au territoire français, dans la seule limite voulue par la Franco.' By the Franco-Spanish Convention of November 1912, the rights of Spain in her zone of influence were defined, and Spain undertook not to part with any of those rights.

See *The  
Times*,  
9 June,  
21 Nov.  
(pp. 13 &  
14), &  
18 Dec.,  
1924.

The hold of France over her zone has since been gradually strengthened, partly by means of military expeditions which she has found it necessary to launch against some of the tribes. Spain, however, who appears to have made no treaty for a protectorate with the Sultan, has experienced difficulty in imposing the protectorate she has assumed, owing to the military resistance opposed by the Rifian tribes to any form of Spanish control.

Tangier with an area surrounding it is not included in either the French or the Spanish zone, and in Moroccan treaties made since 1904 it has been laid down that the Tangier zone should be under a 'special régime.' The nature of this régime is determined in the Convention which was signed by the representatives of Great Britain, France, and Spain on the 18th December, 1923. According to that Convention, the Tangier zone is to be permanently neutralized and placed under an International Administration and an International Legislative Assembly, and economic equality between the Powers is to continue to be observed. There is a provision that the sovereignty of the Sultan and his authority over the Moorish population are to remain unimpaired. The zone is thus to form an autonomous internationalized portion of the Sultan's dominions. The special position of France is, however, recognized, the French Government being entrusted with the protection abroad of Moroccan subjects of the zone, while the Administrator for the first six years is to be a Frenchman.

Tangier.  
*The Times*,  
19, 27 & 28  
Dec., 1923.  
Cmd. 2096  
(1924).

### *The Powers and China.*

In China, although, as we shall see later, the European Powers have proceeded mainly by making leases or non-alienation Agreements with China directly, certain spheres of interest have been earmarked by agreements made between the Powers themselves. Thus, by an exchange of notes dated the 20th April, 1898, Great Britain recognized the interests of Germany in the Province of Shantung. Again, by the Anglo-Russian Agreement of April, 1899, Great Britain engaged not to seek any railway concessions to the north of the Great Wall of China, and not to obstruct applications for such concessions in that region supported by the Russian Government; and Russia entered into a corresponding engagement in regard to the basin of the Yang-tszu. Japan's special interests in the part of China to which her possessions are contiguous were also recognized in her Treaty with the United States of November, 1917.

92 S.P. 78.

C.-9241  
(1899).  
91 S.P. 91.  
F.O. Hand-  
book, No.  
67, p. 40.

See p. 231  
below.

By the nine-Power Treaty of Washington of the 6th February, 1922, however, the contracting Powers (the United Kingdom, the United States, Belgium, China, France, Italy, Japan, the Netherlands, and Portugal) agreed (among other things) not to enter into any treaty, agreement, arrangement, or understanding, either with one another or with any Power,

The policy  
reversed.  
*Am. Jl. of*  
*Int. Law*,  
Suppl. 16,  
p. 63-7.  
Cmd. 2617  
(1925).

which would impair or infringe the sovereignty, the independence, or the territorial and administrative integrity of China, or the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China; and 'not to support any agreements by their respective nationals with each other designed to create Spheres of Influence or to provide for the enjoyment of mutually exclusive opportunities in designated parts of Chinese territory.'

*The Powers and Turkey.*

Baker,  
R. S.,  
Chs. III.  
& IV.

112 S.P.  
975.

During the Great War, agreements were made by Great Britain, France, Italy and Russia with regard to the portions of the Turkish Empire that were to fall to each of them in the event of its disruption. Thus the Treaty of the 26th April, 1915, which provided for Italy's entry into the war, contained the following provisions :

D'une manière générale, la France, la Grande-Bretagne et la Russie reconnaissent que l'Italie est intéressée au maintien de l'équilibre dans la Méditerranée et qu'elle devra, en cas de partage total ou partiel de la Turquie d'Asie, obtenir une part équitable dans la région méditerranéenne avoisinant la province d'Adalia où l'Italie a déjà acquis des droits et des intérêts qui ont fait l'objet d'une convention italo-britannique. La zone qui sera éventuellement attribuée à l'Italie sera délimitée, le moment venu, en tenant compte des intérêts existants de la France et de la Grande-Bretagne.

Les intérêts de l'Italie seront également pris en considération dans le cas où l'intégrité territoriale de l'Empire ottoman serait maintenue et où des modifications seraient faites aux zones d'intérêt des Puissances.

113 S.P.  
707.  
Cmd. 963.

This particular arrangement had no counterpart in the abortive Treaty of Peace of Sèvres, but the Tripartite Agreement between Great Britain, France, and Italy, which was signed at the same time as that Treaty, recognized the special political and economic interests of Italy in Southern Anatolia and of France in Cilicia and the western part of Kurdistan.

*Tendency of these Spheres to ripen into Sovereign Rights.*

Thus, although it cannot be said that spheres of interest of this nature are always precursors of some form of political control, the tendency for them to ripen into full or partial rights of sovereignty can be plainly seen in some of the cases we have described and in others not mentioned here. Corea has been entirely absorbed; Tripoli, too, which was seized and annexed by Italy in 1911-12 had for years been recognized as an Italian

F.O. Hand-  
book, No.  
127.

sphere of influence by France and Great Britain; in Morocco, both France and Spain have reached the protectorate stage. In Afghanistan and Persia, the process proceeded to a certain point, but was reversed after the Great War. Moreover, the fact that the agreement between the Powers usually contains an express recognition of the independence of the State whose territories are comprised in the sphere, or a declaration against annexation, would seem to show that it is recognized that otherwise the mere establishment of a sphere of interest of this kind might not unreasonably be interpreted as a step towards annexation.

(3) Spheres of Influence in the Territory of a single State by direct agreement with its Sovereign.

Agreements by the sovereign of certain territory not to alienate it except to the other contracting State are not unknown among the European Powers themselves. Thus, by the Anglo-Portuguese Convention of the 11th June, 1891, the two Powers agree that each shall have a preferential right to the territories south of the Zambezi assigned by the Convention to the other of them; and the Belgian Government, confirming the undertaking of its predecessor in title, the Independent State of the Congo, has agreed to recognize in France a right of preference over the territories of the Belgian Congo. When similar rever-  

 Agree-  
ments  
between  
European  
Powers.  
83 S.P. 27.  
  
102 S.P.  
387.  
90 S.P.  
1280.  
51 S.P.  
1066.  
  
Agree-  
ments with  
non-  
European  
States.  
  
102 S.P.  
124-5.  
Duff De-  
velopment  
Co. v. Govt.  
of Kelantan  
1924,  
A. C. 797.  
  
77 S.P.  
1209.  
87 S.P.  
496.
 
 sionary interests are obtained by a European Power in virtue of an agreement with a non-European State they are usually spoken of as setting up spheres of influence or interest.

Two instances of spheres of interest so created which have ripened into territorial rights may be mentioned. The King of Siam agreed with Great Britain in 1897 that he would not 'cede or alienate to any other Power any of his rights over any portion of the territories or islands' in the Malay Peninsula lying to the south of Muong Bang Tayan; in 1909 the Siamese Government's rights of suzerainty, protection, administration and control over the southern portion of the area covered by the 1897 Agreement were transferred to Great Britain. Similarly, the British Protectorate over the Island of Socotra and its dependencies, which was set up in 1886, was preceded by an Agreement, made in 1876, by which the Sultan bound himself, his heirs, and successors, never to cede, sell or mortgage the territories in question, or otherwise give them for occupation, save to the British Government.

*The Powers in China.*

96 S.P.  
572.  
O.-8040  
(1898).

Other instances of spheres of this kind occur in China, which State has made non-alienation agreements with several Powers. For example, by an exchange of notes with Great Britain in February, 1898, China declared it to be out of the question that, in the Yang-tszo region, 'now entirely hers,' any territory should be mortgaged, leased or ceded to another Power. In this case, as we have soon, Great Britain followed up her arrangement with China by an agreement with Russia, which secured to her, so far as that Power was concerned, the sole right of obtaining railway concessions in the Yang-tze basin, and thus obtained a double recognition of her interest in the region.

F.O. Hand-  
book, No.  
67, p. 90.

In 1898, the Chinese Government also promised France that they would not alienate any territory in the provinces of Kwangtung, Kwangsi or Yunnan, or cede the Island of Hainan; while Japan obtained an undertaking that no territory would be alienated in the province of Fukien.

F.O. Hand-  
book, No. 69,  
p. 22.

China's recognition of Japan's interest in Southern Manchuria in May, 1915, took the form of an agreement to give, among other things, a preference to Japanese capital if required for railways, etc., and, if foreign advisers or instructors on political, financial, military, or police matters were to be employed there, to employ Japanese first.

*Great Britain and Tibet.*

F.O. Hand-  
book  
No. 70,  
p. 37 *sq.*

Great Britain's special interest in Tibet has been recognized, not only by the Tibetans themselves, but also by China, their suzerain, as well as by Russia, the other Power more immediately concerned.

98 S.P.  
148.

The British expedition to Lhasa obtained from the Tibetan Government, in September 1904, an undertaking providing *inter alia* that no portion of Tibetan territory should be 'ceded, sold, leased, mortgaged, or otherwise given for occupation, to any foreign Power'; that no such Power should be permitted to intervene in Tibetan affairs or to send representatives to Tibet; and that no concessions for railways, roads, telegraphs, mining or other rights would be granted, or Tibetan revenues pledged, to any foreign Power or foreign subject.

99 S.P.  
171.

This Convention was confirmed by China as the suzerain in April 1906, Great Britain engaging 'not to annex Tibetan territory or to interfere in the administration of Tibet,' and

China undertaking 'not to permit any other foreign State to interfere with the territory or internal administration of Tibet.'

By their Agreement of the 31st August, 1907, Great Britain and Russia, 'recognizing the suzerain rights of China in Tibet, and considering the fact that Great Britain, by reason of her geographical position, has a special interest in the maintenance of the *status quo* in the external relations of Tibet,' agreed (a) to respect the territorial integrity of Tibet and to abstain from all interference in its internal administration; (b) to negotiate with Tibet only through the intermediary of the Chinese Government; (c) not to send Representatives to Lhasa; (d) neither to seek nor to obtain for themselves or their subjects any concessions in Tibet; and (e) to allow no part of the revenues of Tibet to be pledged or assigned to themselves or any of their subjects.

100 S.P.  
556.  
Cd. 3753  
(1907).

In 1912, the British Government refused to recognize a Chinese 'mandate' declaring Tibet, along with Mongolia and Turkestan, to be an integral part of China; and, on China's sending an expeditionary force to Lhasa, informed the Chinese Government that Great Britain was not prepared to admit the right of China to interfere in the internal administration of Tibet, or to maintain there an unlimited number of troops.

In 1914, a draft Convention was adopted by representatives of Great Britain, China and Tibet, according to which, while the whole of Tibet was to remain under the suzerainty of China, the country was to be divided into two portions—Outer Tibet, which was to form an autonomous State under British protection, and Inner Tibet, in which China was to have control. China was not to convert Tibet into a Chinese province, and Great Britain was not to annex it or any portion of it. The Chinese Government, however, refused to sign the Convention on account of disagreement with the boundaries therein drawn.

#### *Effect and Purpose of these Arrangements.*

Merely non-alienation and similar agreements of the type of those here mentioned give no territorial rights to the European parties to them; but they warn off other Powers, and can probably be regarded as earmarking the territories in question for the Powers concerned in case future events should render the acquisition of such territories possible or desirable.

See  
Westlake,  
I. VI.

## (4) (i) Principle of Geographical Contiguity.

It has sometimes been claimed that a Power which is in actual possession of certain territory has thereby acquired rights over contiguous country which has not been appropriated by another Power.

Claim of  
the United  
States  
against  
Great  
Britain.  
Twiss;  
*Oregon*,  
310.  
Whiston,  
p. 277.

During the negotiations with regard to the Oregon territory in 1826-7, the United States Commissioners maintained that the actual possession and populous settlements of the valley of the Mississippi, including Louisiana, then under one sovereignty, constituted 'a strong claim to the westwardly extension of that province over the contiguous vacant territory, and to the occupation and sovereignty of the country as far as the Pacific Ocean.' 'It will not be denied,' they added, 'that the extent of contiguous territory to which an actual settlement gives a prior right, must depend, in a considerable degree, on the magnitude and population of that settlement, and on the facility with which the vacant adjoining land may, within a short time, be occupied, settled, and cultivated by such population, as compared with the probability of its being thus occupied and settled from another quarter.'

Claim of  
Great  
Britain  
against  
Venezuela.  
C.-9336  
(1890),  
149.

The principle put forward by the United States in 1826 was pleaded on behalf of Great Britain in the Venezuela Boundary Arbitration in 1899. As we shall see in Chapter XXVII, Great Britain urged that the line of division between rival settlements should be the one which divides the country in accordance with the principles of natural division. 'But great weight,' it was added, 'must also be given to the relative importance and presumable power of expansion in the direction of the vacant territory of the settlements, between which it is to be divided.'

C.-9501  
(1899),  
p. 723.

But Great Britain did not attach great weight to a title based upon either of these principles, for she admitted that another Power might encroach upon the intervening territory, although such a Power would acquire no more territory in derogation of the sovereignty of the Power claiming under the principles 'than it actually and effectively occupies by its encroachment.' And Venezuela would not agree to a rule which, she declared, divided a territory according to the relative wealth, population and power of the discoverer and a second comer.

Where conti-  
guity is not

The view adopted by Venezuela appears to be the reasonable one. If one State has greater facilities than another for acquir-

ing a particular territory, it should exercise its facilities and take actual possession of the territory if it wishes to acquire legal rights over it.

And this is the position usually taken up by writers. Thus Twiss, referring to the claim of the United States to set up an exclusive title by contiguity, says that

a source of legal rights.  
Westlake,  
I. V.

Views of writers.

Twiss,  
Oregon, 312.

The reason which Mr. Gallatin [one of the United States Commissioners] alleged in support of the title by contiguity; namely, the facility with which the vacant territory would be occupied by the teeming population of the United States, is but a disguised appeal to the principle of the *vis major*, and strikes at the root of the fundamental axiom of international law, that all nations are upon a footing of perfect equality as to their obligations and rights. . . . So that every argument which rests on the grounds that the millions already within reach of the Pacific Ocean, entitle the United States by their numbers to the occupation and sovereignty of the country, to the exclusion of Great Britain, is out of place where questions of greater right, and not of greater interest, are under discussion.

'A défaut de limites certaines,' wrote G. F. de Martens, 'le droit d'une nation d'exclure des nations étrangères des terres ou des voisins ne s'étend pas au delà du district qu'elle cultive, ou duquel du moins elle peut prouver l'occupation.'

G. F. de Martens.  
§ 38.

'Jamais on ne prouvera,' contended the French Government with respect to the interpretation of certain parts of the Treaty of Utrecht, 'quo par les *appartenances* et les dépendances d'un pays, on doit entendre ceux qui en sont voisins. Proximité et dépendance sont deux idées différentes, distinctes; leur confusion entraîneroit celle des limites de tous les Etats.'

The French Government on the Treaty of Utrecht.  
Phillimore, I.  
§ CXXXVI.

### *Germany and England in South-west Africa.*

The proposition that a State cannot sustain a legal claim to rights over unappropriated territory, merely upon the ground of the contiguity of its own possessions, also receives support from the abandonment by Great Britain of the claim which she made in 1883 to rights of priority over the territory subsequently acquired by Germany in South-west Africa.

In reply to an enquiry from Germany, Earl Granville stated that 'although Her Majesty's Government have not proclaimed the Queen's sovereignty along the whole country, but only at certain points, such as Walvisch Bay and the Angra Pequena Islands, they consider that any claim to sovereignty or jurisdiction by a foreign Power between the southern point of

75 S.P.  
523 sq.  
F.O. Handbook, No. 42, p. 46 sq.  
Fitzmaurice:  
Life of Granville,  
II., 342 sq.

Portuguese jurisdiction at latitude 18° and the frontier of the Cape Colony would infringe their legitimate rights.'

The German Government replied that they could not admit any rights based entirely on the plea of propinquity to the exclusion of the jurisdiction of any other Power, and objected to the claim that England appeared to advance 'to prevent settlements by other nations in the vicinity of English possessions,' and to establish 'a sort of Monroe doctrine in Africa against the vicinity of other nations.'

76 S.P. 801.

It appears clear that, when Earl Granville put forward his claim on behalf of Great Britain, he did not suspect that Germany contemplated the acquisition of the territory in question for herself. When he heard that a German protectorate had been proclaimed, he informed Germany that, if it was her intention to establish in the region a colony or a territorial protectorate, Her Majesty's Government would welcome her as a neighbour in those parts of the coast which were not already within the limits of the Cape Colony and not actually in British possession. 'The German Emperor,' said the British Colonial Secretary to the High Commissioner in South Africa, 'had acquired for himself, by the recognised means, a strip of territory to which the Queen of England had no sufficient legal title.'

C.-4255  
(1884),  
p. 6.

*But contiguity may have political importance.*

But if mere geographical contiguity is not a source of legal rights, it is frequently allowed to have important political consequences.

Great  
Britain and  
Germany  
in New  
Guinea.  
76 S.P.  
790.

This point was well brought out by the German Ambassador in 1885, when, having laid down that 'only such titles to sovereignty are to be recognized as are actually enforced,' he told Earl Granville that 'although by this, in the abstract, the whole independent portion of New Guinea formed in principle quite as justifiable an object of German as of English undertakings, the Imperial Government desired nevertheless to recognize as justified the wish of the Australians that no foreign Power should settle on the south coast of New Guinea in the region of the Torres Straits opposite Queensland.'

'Contigu-  
ity' in-  
voked to  
explain  
political  
action.

The principle of contiguity has also been invoked to justify or explain political action, and in that connection has sometimes found a place in international treaties.

For example, in the reciprocal undertakings regarding Egypt and Morocco contained in the Franco-British Agreement of the

8th April, 1904, Great Britain's agreement to allow France a free hand in Morocco was put in particular upon the ground that French dominions were 'conterminous for a great distance with those of Morocco.' The interests of Spain arising from 'her geographical position and from her territorial possessions on the Moorish Coast of the Mediterranean' were also recognized in that agreement.

France and Spain and Morocco.  
See p. 221 above.

Great Britain's recognition, in the Anglo-Japanese Treaty of August 1905, of the dominant position which Japan was acquiring in Corea, was justified by the British Foreign Minister on the ground that Corea, 'owing to its close proximity to the Japanese Empire and its inability to stand alone, must fall under the control and tutelage of Japan.'

Japan and Corea.  
See p. 219 above.

Again, the special interests which Great Britain and Russia had in Persia 'for geographical and economic reasons' were recited in the Anglo-Russian Agreement of August, 1907, by which Persia was divided into British and Russian spheres of influence. In the same Agreement, recognition was given to the special interest which, 'by reason of her geographical position,' Great Britain had in the maintenance of the *status quo* in the external relations of Tibet.

Great Britain and Russia and Persia.  
See p. 219 above.  
Great Britain and Tibet.  
See p. 227 above.

Lastly, the political consequences flowing from Japan's proximity to the Chinese Empire were recognized by the United States in the Notes exchanged between that country and Japan on the 2nd November, 1917. 'The Governments of the United States and Japan,' run the Notes, 'recognise that territorial propinquity creates special relations between countries, and consequently the Government of the United States recognises that Japan has special interests in China, particularly in that part to which her possessions are contiguous. The territorial sovereignty of China nevertheless remains unimpaired.' The Chinese Government, on these Notes being communicated to them, pointed out that they were not bound by any such principle except by virtue of a treaty to which they were a party.

Japan and China.  
111 S.P. 696.  
F.O. Handbook, No. 67, p. 99 sq.

111 S.P. 702.

#### (4) (ii) Economic and Political Considerations.

Analogous to the claims which have been laid to unappropriated territory upon the principle of contiguity, are those which have been put upon an economic or political basis, such as upon the ground of the needs of the settlers in an adjoining area.

See Twiss: § 123.  
F. de Martens, I. § 88.

These considerations are not of legal importance.

Lamu Arbitration.

Hortale; *Map of Africa, etc.*, III. 893. 22 *R.D.I.*, 353.

Such claims as these were put into their proper place by Baron Lambormont, in his arbitral award of the 17th August, 1889, between the British East Africa Company and the German Witu Company with regard to the island of Lamu. He made use of the following language :—

Si des considérations basées sur l'intérêt économique et administratif ou sur des convenances politiques peuvent mettre en lumière les avantages ou les inconvénients qu'offrirait une solution conforme aux vues de l'une ou de l'autre des parties, de telles raisons ne tiennent pas lieu d'un mode d'acquisition reconnu par le droit international. . . . Nous sommes d'avis que ni la dépendance géographique, ni la dépendance commerciale, ni l'intérêt politique proprement dit ne mettent aucune des parties en position de réclamer, à titre de droit, la cession des douanes et de l'administration de l'île de Lamu.

Great Britain and France re Burmah. 77 S.P. 140 *sq.* & 980.

The principle to which Baron Lambormont referred, showed itself in practice in the discussion which took place between Great Britain and France with reference to Burmah.

In 1884, when the King of Burmah endeavoured to negotiate a treaty with France, the British Government informed the French Foreign Minister that 'from its geographical position and its peculiar political relations with British India,' Her Majesty's Government attached a special importance to all that related to Burmah, and would entertain serious objections to any special alliance or political understanding being arrived at between Burmah and any other Power. Later on, the French Minister enquired whether there were 'any special Treaty engagements between Great Britain and Burmah which precluded the Burmese from entering into independent political relations with other Powers.' Her Majesty's Government were not, however, able to point to any such engagements. Nor did they base their objections upon International Law. The ground upon which those objections were put by the British Ambassador was that of the political relations between Burmah and British India which, he said, warranted Great Britain's relying upon other Powers' abstaining, 'in friendly consideration' of preponderating British interests involved, from seeking an alliance with Burmah. By Proclamation of the 1st January, 1886, Upper Burmah was added to the British dominions.

#### (4) (iii) Principle of Security.

In other cases, the principle appealed to has been that of the security of an adjoining occupied area.

Thus Lord Stowell, in the case of *The Anna*, as we have seen in Chapter II, referred to the danger which would result to the United States if the little mud islands off the coast belonged to any other Power. 'The possibility of such a consequence,' he said, 'is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of *America*.' His Lordship was not, however, here deciding between rival claims to territory, and his judgment was based chiefly upon the principle of alluvium and increment.

Lord  
Stowell.  
5 Robin-  
son's Reps.,  
385 c & d.

Twiss, in refuting the doctrine of contiguity, referred to the 'law of self-preservation' as forming a better basis for a legal title. Where the control of a district, not actually reduced into possession, is necessary for the security of one State and not essential to that of another, he would allow the former State a prior right to it.

Twiss.

*Law of  
Nations*,  
§ 123 &  
*Oregon*,  
174-d &  
312.

Phillimore considers that an actual settlement at the mouth of a river carries with it a right over all the territory that is essential to the real use of the settlers, or for the integrity and security of the possession as measured by the principle *ibi finitur imperium ubi finitur armorum vis*. He adds, however, that 'the application of the principle to a territorial boundary is, of course, dependent in each case upon details of the particular topography.'

Phillimore.

I.  
§CCXXXVII

Hall, too, teaches that 'a settlement is entitled, not only to the lands actually inhabited or brought under its immediate control, but to all those which may be needed for its security, and to the territory which may fairly be considered to be attendant upon them.'

Hall.

II. II., p. 120

As against Great Britain, Venezuela claimed that the rule of reasonable security gave her predecessor, Spain, 'as appended to her Orinoco settlements, both banks of the Orinoco, and of all affluents of that river entering above Barima Point, and, at the least, such a width of territory to the east of the Orinoco as would reasonably protect its eastern or southern bank and the settlements thereon from quick and easy attack.' The Arbitrators' decision gave to Venezuela the mouth of the Orinoco down to Barima Point. But Venezuela had been able to show the exercise of sovereignty over that district, and it is not clear whether or not the Arbitrators were influenced by the principle of reasonable security.

Venezuela  
Boundary  
Arbitra-  
tion.  
C.-9501  
(1890),  
732.

In spite of the support which this principle has received, it would probably be difficult nowadays to establish a claim to an

Considerations of security are not likely nowadays to be allowed legal consequences.

unappropriated district merely upon the ground that its possession was essential to the security of a neighbouring occupied region. Such a consideration might, no doubt, have been properly taken into account from the legal point of view when rival Powers were advancing into an unexplored continent. But now that the world has been so thoroughly mapped, and the strategical relationships of different portions of territory can be readily estimated, if a State that had not taken the necessary steps to secure a particular region were to claim that possession of the region was necessary for its own safety, such an argument would not be likely to have much weight if it were addressed to a Court of Arbitration.

*Jackson v. Porter, I. Paine at 482.*

In the New York Circuit Court, as long ago as 1825, Judge Thompson refused to agree to the proposition that the jurisdiction of a fort extended around it to a distance of three miles in every direction, in analogy to the rule with reference to the marginal belt round the coast. 'It is to be proved,' he said, 'as matter of fact, to what extent jurisdiction was exercised.' It is probable that similar proof would be required from a State which, in face of a rival claim, alleged that the possession of a certain region was necessary to its security.

#### (4) (iv) Hinterland.

During the scramble of the European Powers for territory in Africa, the principle of contiguity was invoked under the guise of a claim, sometimes set up by the Powers which had taken possession of part of the coast of the continent, to an indefinite area of the hinterland, or adjoining interior country.

*See Map, Scott Keltie, 192.*

76 S.P. 759.

F.O. Handbook, No. 42, p. 53.

While the Powers were engaged in taking possession of the African coast, there was a practically unlimited area of interior country available, and each coastal settlement was free to expand into the interior in accordance with the theory of hinterland. It was, moreover, generally recognized that it would be unreasonable and impolitic to coop up the settlement within a narrow strip of land along the coast. Thus in 1884 Lord Granville assured the German Government that Great Britain would in no way endeavour to impede the extension inland of the German settlement of the Cameroons; and in 1887 Lord Salisbury informed the same Government, with reference to East Africa, that the British Government were 'prepared to discourage British annexations in the rear of the German sphere of influence, on the understanding that the German Government will equally discourage German annexations in the rear of the British sphere of influence.'

*Hartaleb: Map of Africa, etc., III. 889, 783.P.1048.*

tions in the rear of the British sphere.' In 1890 Turkey appealed to the doctrine in laying claim to a large area adjacent to Tripoli. 1018.P.627

But when the expansion inland had become general, and a large part of the interior of the continent had been appropriated, the hinterland doctrine was inadequate to determine the extent of inland territory that a coastal settlement carried with it. The boundaries of the possessions of the several Powers were then settled by reciprocal agreements between those Powers which were extending their dominion in adjoining regions; and little respect was paid to claims based upon the hinterland theory unless they were rendered definite by such reciprocal agreements or by the conclusion of treaties with the local chiefs.

See Map,  
Scott-Kellic,  
518.  
Hall;  
Foreign  
Powers, etc.  
§ 101.

'The modern doctrine of Hinterland,' said Lord Salisbury in 1896, 'with its inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or control.' 'The theory or practice of the "Hinterland" idea,' replied the United States Secretary of State, . . . (is) 'unknown to international law.'

88 S.P.  
1293 & 1287.

The hinterland doctrine 'requires for its application the existence or assertion of political influence over certain territory, or a treaty in which it is concretely formulated,' declared the Arbitrator in his Award of the 23rd May, 1911, in the matter of the southern boundary of the Walfisch Bay territory.

Ca. 5857  
(1911),  
p. 32.

As we have noticed in Chapter II, the principle underlying the hinterland doctrine has recently been claimed, particularly in Canada and Australia, to be applicable to all the land within the sectors of the earth's surface that are bounded laterally by meridians of longitude and extend from the North Pole and the South Pole to the nearest occupied countries. It does not appear, however, that the doctrine has acquired any greater legal sanction in its application to those regions than in regard to unoccupied territory in other parts of the world; and if the evident advantages of some such rule for regulating territorial acquisitions in the Arctic and the Antarctic are to be realized, an international agreement upon the point seems to be necessary.

Arctic and  
Antarctic  
hinter-  
lands.

#### (4) (v) Enclaves.

Allied to the questions of contiguity and hinterland is that of Enclaves. At the Lausanne session of the Institut de Droit X. Ann. 190-1.

International, there was a proposal to include in the declaration relative to the occupation of territories a provision to the effect that an occupying or protecting Power should have rights over any totally or partially independent enclaves which might be found in the territories occupied or protected. The proposal, however, met with opposition and was withdrawn. Here again, although the situation of a surrounding Power would put it in an eminently favourable position for acquiring the enclave, there appears to be no reason why legal rights should be based upon that fact. In the island of Timor, Portugal and Holland each acquired enclaves in the territory of the other, and agreed to exchange them as part of a general frontier rectification. In the course of the discussions, the question whether an 'enclave' must be entirely surrounded by land or may be partly bounded by the sea was raised but was not settled.

Wilson :  
*Hague*  
*Arbitra-*  
*tion Cases*,  
p. 374.  
F.O. Hand-  
book, No.  
80.

#### Summary.

With respect to all of these classes of 'spheres of influence,' we can say then that no territorial rights of a legal nature accrue to the influencing Power from the mere establishment or existence of the sphere. The only legal results which flow directly therefrom are the contractual rights which the interested Power in the first three classes obtains to forbearances on the part of the other party or parties to the contract. At the same time, any intrusion of a third Power into an avowed sphere of influence would be an unfriendly act towards the influencing Power; and the situation created is one out of which territorial rights may, and, at all events so far as the spheres of the Class (1) type are concerned, almost certainly will develop.

## CHAPTER XXV.

### LEASES AND RIGHTS OF 'OCCUPATION AND ADMINISTRATION.'

WHILE the normal modern process of acquiring sovereignty or control over backward territory may be said to involve some or all of the successive stages, sphere of influence—colonial protectorate—effective occupation—annexation, that is to say, it is a process in which the external sovereignty is first acquired, in several instances a process which has led, or tends to lead, to the same final result, has been initiated by a transfer involving the whole of the internal sovereignty but not necessarily the full external sovereignty. Such transfers have usually purported to be of a temporary character, and have taken the form of a lease of the territories dealt with, or of a grant, or assumption, of the right to 'occupy and administer' them.

#### *The Sultan of Zanzibar's Leases.*

Leases formed a feature of the process by which Great Britain, Germany and Italy acquired territory in East Africa from the Sultan of Zanzibar. In 1886, the British and German Governments had come to an agreement between themselves with regard to the limits to which the territories of the Sultan extended on the mainland. These limits had been accepted by France; and the Sultan, having no alternative, had agreed to them, although he considered that part of his Kingdom was being taken from him. The territories which had been recognized to be under the sovereignty of the Sultan included a strip of coast ten miles in width, part of it bordering the German sphere and part the British sphere in East Africa, and certain ports on the Benadir coast farther north.

By grants made by the Sultan in May 1887, October 1888, and March 1890, the British East Africa Company obtained a lease for fifty years of the part of the strip adjoining the British

Scott  
Keltie  
244 *sq.* &  
344 *sq.*  
Luena,  
166 *sq.*  
F.O. Hand-  
book, No. 96.  
77 S.P.  
1130 *sq.*  
Hortelot:  
*Map of*  
*Africa, etc.,*  
III. 887.

The  
British and  
Italian  
grants.

79 S.P. 374. sphere and of the Benadir ports. The concession included full powers of administration, which were to be exercised in the name of the Sultan's name and under his flag, and subject to his sovereign rights. The Company was given the sole right of levying taxes and customs duties; and certain annual payments were to be made by the Company to the Sultan.

*Hertslet: op. cit. III. 1061-1100.*  
84 S.P. 630.  
92 S.P. 855.  
98 S.P. 130.  
F.O. Handbook, No. 89, p. 50.  
88 S.P. 920.  
Scott  
Keltie  
389.  
*Colonial Office List, 1925, pp. 248 & 476.*  
87 S.P. 963.

In November 1889, the British Company, in anticipation of the Sultan's grant of March 1890, transferred its interests in the Benadir ports to Italy. This transfer was confirmed to Italy, subject to the payment of a quarterly rent, by a direct grant from the Sultan in 1892. Italy subsequently purchased all the Sultan's rights over these ports outright for £144,000.

The lease of the British strip was converted in 1891 into a permanent grant in consideration of an annual payment of £17,000 to the Sultan for rent and interest. In 1895, this strip passed, with the other territories of the British East Africa Company, under the direct administration of the British Government, and formed part of the British East Africa Protectorate. It was transferred in 1905 from the authority of the Foreign Office to that of the Colonial Office; but in 1920, when the other part of the East Africa Protectorate was annexed to form the Colony of Kenya, the Sultan's strip was continued as a protectorate and named the Kenya Protectorate. On the cession of Jubaland by Great Britain to Italy in July 1924, Italy agreed to pay to the Sultan the annual sum of £1,000, 'representing the proportionate share of the annuity which has hitherto been paid by the British Government to the Government of Zanzibar.' Such payment was not, however, to 'represent a tribute implying any survival of sovereignty,' and the Italian Government were given the right, at any time, to discharge their obligation by the payment of a lump sum of £25,000.

*Cmd. 2194 (1924). Cmd. 2427 (1925).*

A concession of the part of the strip skirting the German sphere was obtained from the Sultan by the German East Africa Company in April 1888, on terms similar to those of the grant to the British Company. After a rising against German rule had been crushed, the rights of the Sultan over the German part of the strip were purchased by the Company in 1890 for £200,000. This territory afterwards formed part of German East Africa, and was administered by the Imperial Government. It is now included in the Tanganyika Mandated territory.

The German lease and the earlier Italian lease thus merely

*The German grant. 79 S.P. 325 sq. F.O. Handbook, No. 113, p. 29 sq.*

covered a period of transition between the full sovereignty of the Sultan and that of Germany and Italy respectively ; while Great Britain, although she has complete control of her strip, still pays the Sultan an annual rent for it and regards it as a protectorate.

*Leases of Chinese Territory.*

Several Powers have obtained interests in Chinese territory from time to time under the form of leases.

Port Arthur and Talienwan were leased to Russia in 1898 for twenty-five years. By the Treaty of Peace of Portsmouth, concluded in 1905, Russia ceded the lease to Japan. The cession was made subject to the consent of China, and this was given by the Treaty of the 22nd December, 1905, Japan, on her part, engaging, 'so far as circumstances permit,' to 'conform to the original Agreements concluded between China and Russia.' In May 1915, the term of the lease was extended to ninety-nine years, i.e. until 1997.

The Russian and Japanese leases of Port Arthur. 98 S.P. 738 & 741. 110 S.P. 796-8.

Germany, in 1898, as part of the compensation for the murder of two German missionaries in the Province of Shantung, extorted from the Chinese Government a lease of Kiauchau in Shantung. The lease was stated to be 'provisionally for ninety-nine years,' and the Chinese Government, 'in order to avoid the possibility of conflicts,' agreed to 'abstain from exercising rights of sovereignty in the ceded territory during the term of the lease.' It was provided that, should Germany wish to return Kiauchau to China before the expiration of the lease, China would refund to Germany the expenditure she had incurred there, and cede her a more suitable place. Germany engaged that she would not sub-let the leased territory to another Power.

The German lease of Kiauchau. *Comb. Mod. Hist. XII.* 513. 98 S.P. 1005. F.O. Handbooks, Nos. 67 & 71.

Early in the Great War, Kiauchau was taken by a Japanese expedition accompanied by a small British force. At the Peace Conference, the Chinese delegation made strenuous efforts to have the territory restored directly to China, but the Peace Treaty transferred all Germany's rights to Japan. At the same time, the Japanese delegates, repenting a promise made during the War, declared that it was the policy of Japan to hand back the Shantung Peninsula in full sovereignty to China on certain conditions—a promise which was redeemed by the Washington Treaty of the 4th February, 1922.

Kiauchau returned to China. *Art.* 150-3. 110 S.P. 791-5. Baker : *Woodrow Wilson, etc.*, Ch. XXXVI. 118 S.P. 876. *Suppt. to Am. Jl. of Int. Law*, 16, p. 84.

Great Britain, on the 1st July, 1898, obtained a lease of Weihaiwei and the adjacent islands and waters 'for so long a

**The  
British and  
French  
leases.**  
90 S.P.  
16 & 17.  
F.O. Hand-  
books, Nos.  
67, 71 & 73  
(p. 87).

**F.O. Handbook,**  
No. 77, p. 10.

**The Washing-  
ton Agree-  
ments.**

*Statesman's*  
*Year Book*  
1925, p. 748.  
116 S.P. 435.

Cmd. 2617  
(1925).  
*See also*  
p. 223  
*above.*

116 S.P. 596.

period as Port Arthur shall remain in the occupation of Russia'—the subsequent transfer of Port Arthur to Japan was not considered by Great Britain to affect her position. Within the territory leased (excluding the walled town of Weihaiwei), Great Britain was to have sole jurisdiction. The reason for the lease was stated to be 'in order to provide Great Britain with a suitable naval harbour in North China, and for the better protection of British commerce in the neighbouring seas.' There was no provision for any compensation to China. About the same time, the limits of British territory at Hong Kong were considerably 'enlarged upon lease' for ninety-nine years, and upon similar terms. France, in 1898, obtained a lease of Kwang-chow-wan for ninety-nine years. At the Washington Conference in January 1922, Great Britain and France promised, in view of the restoration of Kiauchau by Japan, to return Weihaiwei and Kwang-chow-wan to China.

By the nine-Power Treaty of Washington of the 8th February, 1922, the contracting Powers, other than China, agreed to respect, not only the sovereignty and the independence, but also the 'territorial and administrative integrity of China.' At the same conference, China declared that she was prepared to undertake 'not to alienate or lease any portion of her territory or littoral to any Power.'

### *The Anglo-Congolese Leases.*

*Scott*  
*Keltie*  
381 *sq.*  
C.-7368  
and  
C.-7390  
(1894).

F.O. Hand-  
book, No. 90,  
p. 33 *sq.*

The leases granted in the Anglo-Congolese Agreement of the 12th May, 1894, to which we have already referred in Chapter XXIV, were of a remarkable nature.

By Article II, Great Britain granted to King Léopold a lease of a large area in the valley of the Upper Nile, 'to be by him occupied and administered.' The lease was to remain in force during the reign of King Léopold, and afterwards, in respect only of part of the region dealt with, 'so long as the Congo territories as an Independent State or as a Belgian Colony remain under the sovereignty of His Majesty and His Majesty's successors.'

By Article III, the Independent Congo State leased to Great Britain, 'to be administered when occupied,' a strip of territory extending from Lake Tanganyika to Lake Albert Edward. This lease was to endure for the extended period provided for by Article II.

By Article IV, each of the High Contracting Parties recognized that it neither had nor sought to acquire any political

rights in the territories ceded to it under lease other than those which were in conformity with the agreement.

Great Britain, in thus granting to King Léopold a lease of a large tract of territory which she had never occupied, obtained from that monarch a recognition that the region was within her sphere of influence and, at the same time, endeavoured to take advantage of the Congo State's occupation of the territory. So far as the latter object was concerned, the attempt, as we have seen, met with little success, because King Léopold, in deference to the wishes of France, agreed that, over the greater part of the territory, he would not take advantage of the rights granted to him by the lease.

During the Franco-British contest about the valley of the Upper Nile, Lord Salisbury had, however, said that the agreement was 'in existence and full force still'; and after France had agreed, by the Declaration of the 21st March 1899, to leave the region to England, King Léopold endeavoured to revive his claims under the lease. But in this attempt he was unsuccessful, and by the Anglo-Congolese Agreement of the 9th May, 1906, the lease was formally annulled.

It was, however, agreed that King Léopold should remain in occupation, during his reign, of the small part of the leased territories of which he had actually taken possession—the Lado Enclave—but that within six months of the termination of his occupation the Enclave should be handed over to the Soudanese Government. Moreover, a narrow strip stretching from the watershed between the Nile and the Congo to Lake Albert, and forming part of the Enclave, was to continue in the possession of the Independent State of the Congo upon the conditions originally laid down.

The lease of the Tanganyika—Albert Edward strip granted by King Léopold to Great Britain by Article III was objected to by Germany on the ground that an indefinite lease is equivalent to a complete cession, and as being a violation of the Anglo-German arrangement of 1890, under which the Western boundary of the German sphere was to be 'coterminous with the Congo Free State'; and Article III. was withdrawn from the agreement a few weeks after its signature.

These leases stand apart from the others we have considered, in that, although they related to territory which had not been effectively occupied by a member of the International Family, they were made between two colonizing States and not between a European Power and the native authority in the area.

C.-9055  
(1888).  
Scott  
Keltie:  
Article:  
'Africa,'  
in the *Encyclopædia  
Britannica*.  
99 S.P. 174.  
F.O. Hand-  
book, No. 98,  
p. 33.

See 103  
S.P. 458.

82 S.P. 35.  
Hall, II. I.  
p. 111 (note).  
Scott  
Keltie, 386.  
C.-7390 &  
7540 (1894).  
80 S.P. 23.

Moreover, although the probable result of the leases would have been to push forward the process of territorial acquisition by expediting the effective occupation of the territories concerned, the sovereign rights secured thereby should, according to the terms of the leases, have accrued eventually to the lessor; and probably there was not the same tendency for such rights to pass from the lessor to the lessee as in the cases where the lessor is the Government of a less advanced country.

*Great Britain in Cyprus.*

Although the arrangement under which Great Britain took possession of Cyprus was not formally called a lease, the conditions set up were of a similar nature.

60 S.P.

746 sq.

F.O. Hand.  
book, No. 65.

By the Anglo-Turkish Convention of defensive alliance of the 4th June, 1878, entered into 'with the object of securing for the future the territories in Asia of His Imperial Majesty the Sultan,' the Sultan agreed, 'in order to enable England to make necessary provision for executing her engagements, . . . to assign the Island of Cyprus to be occupied and administered by England.'

By an annex to this Convention, England agreed to pay to the Porte 'whatever is the present excess of revenue over expenditure in the island'; and it was provided 'that if Russia restores to Turkey Kars and the other conquests made by her in Armenia during the last war, the Island of Cyprus will be evacuated by England.'

60 S.P.

769.

Later in the same year, in another agreement, it was declared that 'His Imperial Majesty the Sultan, in assigning the Island of Cyprus to be occupied and administered by England, has thereby transferred to and vested in Her Majesty the Queen, for the term of the occupation and no longer, full powers for making Laws and Conventions for the government of the Island in Her Majesty's name, and for the regulation of its commercial and Consular relations and affairs free from the Porte's control.'

Hall;

*Foreign  
Powers, etc.,*  
§§ 98 & 99.

The internal sovereignty was thus placed completely in the hands of Great Britain, a fact which other Powers recognized by forgoing their rights of jurisdiction under the capitulations. The British Parliament even went so far as to legislate for the Island: the Copyright Act, 1911, and the Maritime Conventions Act, 1911, being made applicable, not only to His Majesty's Dominions, but also 'to any territories under his protection, and to Cyprus.'

1 & 2 Geo. V.  
c. 46, s. 28.  
1 & 2 Geo.  
V., c. 67,  
s. 9.

With regard to the external sovereignty, if we look merely to the terms of the arrangement this would appear to have remained with the Sultan: and such a result would be in accordance with the proposal of Lord Salisbury in May 1878. 'Her Majesty's Government,' said His Lordship, 'do not wish to ask the Sultan to alienate territory from his sovereignty, or to diminish the receipts which now pass into his Treasury. They will, therefore, propose that, while the administration and occupation of the island shall be assigned to Her Majesty, the territory shall still continue to be part of the Ottoman Empire.' It was also in keeping with such a view that natives of the island, when in countries outside the Ottoman Empire, were not treated by Great Britain as her protected subjects. In fact, however, the sovereignty of the Sultan was little more than nominal, Great Britain being, for most practical purposes, also the external sovereign. On the outbreak of war with Turkey in November 1914, the island was formally annexed by Great Britain, this annexation being recognized by Turkey in the Peace Treaty of Lausanne (Article 20).

69 S.P.  
1344.

Hall:  
*Foreign  
Powers, etc.*  
p. 226.

108 S.P.165  
Cmd. 1929  
(1923).

#### *Effect of these arrangements.*

In cases such as these, the internal sovereignty passes under the lease or grant. Where the lease is for years, or some other definite period, there remains a reversionary right in the lessor—a right which was recognized in connection with the transfer of Port Arthur from Russia to Japan, and in the restoration of Kiauchau and the promised restoration of Weihaiwei and Kwang-chow-wan to China. But even where the term of the lease, or of the grant of the right to occupy and administer, is limited, so that it cannot be said to be 'equivalent to a cession' at once, the tendency for established facts to result in legal rights comes into play, and there is always the possibility that, in the long run, the partial transfer will result in a complete alienation.

Bonfilis, §871  
Oppenheim  
I. § 244.  
Curzon:  
*Frontiers*,  
46.

The view which the Russian Government took of its lease of Port Arthur in the first instance was that it amounted to a cession in usufruct 'safeguarding the integrity of the sovereign rights of China.' The British Government, as we have seen, took up a similar position in regard to the sovereignty of the Sultan over Cyprus. On the other hand, the German Government considered that, by the lease of Kiauchau, the Chinese Government had transferred to it 'for the period of the lease, all its sovereign rights in the territories in question.'

Westlake,  
I. VI.

Westlake,  
I. VI.

It seems clear that, for practically all international purposes, third Powers regard the leased or administered territory as under the sovereignty of the lessee or occupant; and the case of Kiauchau shows that they would treat it as hostile territory if they were at war with the lessee. If this were not so, the lessor State would, as Westlake pointed out, run the risk of having its neutrality violated by the use of the leased territory by the lessee for the purposes of a war against a third State.

Regarded as methods of acquisition, these arrangements are thus in keeping with the modern practice of acquiring sovereignty, or so much of the sovereignty as is necessary for complete control, by degrees. The inhabitants of the territory are placated in the initial stages by not being severed entirely from their old sovereign, and gradually become accustomed to the control of the acquiring State. So long as that State possesses in fact the supreme authority in the region, it is content to leave the original ruler in nominal possession of part of the sovereignty, and to defer adding the formal to the real sovereignty. The shock of the transfer can thus be eased, and the change effected with less loss of prestige to the original sovereign.

### *Great Britain in Egypt.*

In the British occupation of Egypt we have a case in which the control of the internal administration was acquired without a formal grant, and which is remarkable, not only as furnishing a striking example of the tendency for the influence and control of an occupying Power to become gradually stronger, but as a case in which, after the movement had proceeded far, and the external had been added to the internal sovereignty, the process was suddenly reversed in response to the wishes of the inhabitants.

The occupation was intended to be temporary.  
75 S.P.  
772-3.

When Great Britain took possession of Egypt with a military force in 1882 and began her task of bringing order out of the financial chaos into which the country had drifted, the occupation was declared to be merely temporary. 'The presence of British forces in Egypt,' said Earl Granville in 1884, 'and the part which Her Majesty's Government are taking in the administration of the country, are for a special and temporary purpose, which has been clearly defined in declarations to Parliament, and in diplomatic communications to other Powers. It is their desire to keep within the limits so laid down, and not to extend the scope of British intervention more than is necessary for the efficient realization of the objects in view.'

See Cmd.  
1131  
(1921), p. 2.

But the need for British guidance continued, and the British administration became more and more firmly seated with its continued success. The acquiescence of France in an indefinite British occupation of Egypt was purchased by British recognition of the special interests of France in Morocco, the Anglo-French Agreement of the 8th April, 1904, containing, among other provisions, the following :

His Britannic Majesty's Government declare that they have no intention of altering the political status of Egypt.

The Government of the French Republic, for their part, declare that they will not obstruct the action of Great Britain in that country by asking that a limit of time be fixed for the British occupation or in any other manner.

A secret Article of the Agreement referred to 'the event of either government finding themselves constrained, by the force of circumstances, to modify their policy in respect to Egypt or Morocco.'

Commenting on this Agreement in his despatch to the British Ambassador in Paris, the Marquess of Lansdowne said :—

From a British point of view there is no more remarkable episode in recent history than that which concerns the establishment and the gradual development of British influence in Egypt. Our occupation of that country, at first regarded as temporary, has by the force of circumstances become firmly established. . . . They [the French Government] fully admit that the fulfilment of the task upon which we entered in 1883 must not be impeded by any suggestion on their part that our interest in Egypt is of a temporary character, and they undertake that, so far as they are concerned, we shall not be impeded in the performance of that task. This undertaking will enable us to pursue our work in Egypt without, so far as France is concerned, arousing international susceptibilities. It is true that the other Great Powers of Europe also enjoy, in virtue of existing arrangements, a privileged position in Egypt; but the interests of France—historical, political, and financial—so far outweigh those of the other Powers, with the exception of Great Britain, that so long as we work in harmony with France, there seems no reason to anticipate difficulty at the hands of the other Powers.

Germany, Austria, and Italy subsequently adhered to the Anglo-French declaration.

The position of Great Britain had thus advanced since the commencement of the occupation. Nominally, the govern-

Great Britain becomes firmly established in Egypt. Cd. 1962 (1904). Cd. 5969 (1911). 87 S.P. 39. 101 S.P. 1053. Cromer : *Modern Egypt*, Ch. XLVIII.

Cd. 1962 (1904).

Cromer : *Modern Egypt*, Ch. XLVIII.

ment had remained in the Khedive, ruling under the suzerainty of the Sultan of Turkey; but in reality Great Britain had acquired complete control of both internal and external affairs, although certain other Powers retained extensive rights under the Capitulations.

1088.P.185.

**The  
British  
Protector-  
ate.**

Cmd. 1131  
(1921), p. 7.  
Cmd. 1592  
(1922).

**Egyptian  
independ-  
ence recog-  
nized.**

Cmd. 1617  
(1922).

After the outbreak of war with Turkey in 1914, Egypt was formally declared to be a British Protectorate, and the nominal Turkish suzerainty thus brought to an end. When the War was over, the Egyptian nationalists maintained that they had regarded the proclamation of the British Protectorate as a temporary war measure, and they pointed to the repeated British promises that the occupation should be a temporary one. Eventually, early in 1922, Great Britain terminated her protectorate over Egypt, and recognized that country as an independent sovereign State, reserving for future discussion the questions of the security of communications through Egypt, the defence of Egypt, the protection of foreign interests and of minorities, and the Soudan.

At the same time, it was made clear by a notification, addressed by the British Government to the other Powers concerned, that Great Britain would not tolerate any other foreign control over Egypt. 'The welfare and integrity of Egypt,' ran the notification, 'are necessary to the peace and safety of the British Empire, which will therefore always maintain as an essential British interest the special relations between itself and Egypt long recognised by other Governments. These special relations are defined in the declaration recognising Egypt as an independent sovereign State. His Majesty's Government have laid them down as matters in which the rights and interests of the British Empire are vitally involved, and will not admit them to be questioned or discussed by any other Power. In pursuance of this principle, they will regard as an unfriendly act any attempt at interference in the affairs of Egypt by another Power, and they will consider any aggression against the territory of Egypt as an act to be repelled with all the means at their command.'

## CHAPTER XXVI.

### LEAGUE OF NATIONS MANDATES.

THE Mandatory system set up by the Covenant of the League of Nations not only provided a new method for the transfer of certain territories, but inaugurated a new species of territorial sovereignty, or, perhaps one should say, a sovereignty to which new incidents or limitations attach.

Suggestions had previously been made for the application of the Mandatory principle to the government of backward territory. The inclusion of the principle in the Covenant was partly due to a proposal contained in the pamphlet which General Smuts published at the end of 1918. He pointed out that many of the peoples who would be left behind by the decomposition of Russia, Austria-Hungary and Turkey were unfitted for self-government, and he suggested that, in order to avoid a scramble among the victors for the territories of those empires, the League of Nations should be considered as the reversionary of the empires in the most general sense, and as clothed with the right of ultimate disposal in accordance with two fundamental principles, namely; that the territories should not be annexed to any of the victorious States, and that the consent of the peoples concerned should be obtained to their form of government.

General Smuts further suggested, among other things, that any external authority, control, or administration which might be necessary in respect of those territories should be the exclusive function of the League of Nations; that the League should have the right of delegating its authority in any case to a Mandatory State; that the degree of the Mandatory's authority should be laid down by the League in a special act or charter, which should reserve to the League complete power of ultimate control and supervision; and that the Mandatory State should be bound to maintain equal economic opportunity for all, and to limit the military forces in the territory to the requirements of internal police.

Lugard:  
*The Mandate System*  
etc., *Journal of Soc. of Arts*, Vol. LXXII., p. 535.  
Baker:  
*Woodrow Wilson, etc.*, I. 226.  
General Smuts's proposals.  
Smuts:  
*The League of Nations: A practical suggestion.*

These proposals were not to apply to the German colonies. Those colonies, General Smuts thought, should be disposed of in accordance with the fifth of President Wilson's Fourteen Points—which required 'a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be considered.'

The Peace  
Confer-  
ence.

It came, however, to be recognized that the mandatory principle provided the necessary *via media* between the annexation of colonial territories by the victorious Powers (which those Powers had disavowed) and the return of those territories to Germany and Turkey (which all were agreed was infeasible); and in the sequel it was to the ex-German colonies, together with certain ex-Turkish territories, that, under the influence of President Wilson, the mandatory system was applied by the Peace Conference.

Baker, op.  
cit., I., Ch.  
XV.

The essential feature about the contract of mandate in Roman Law was that the mandatory undertook its performance gratuitously, and this aspect of the principle was emphasized by the Allied and Associated Powers in their reply to the German Delegation to the Peace Conference. 'The Mandatory Powers,' runs the reply, 'in so far as they may be appointed Trustees by the League of Nations, will derive no benefit from such Trusteeship.'

Just., III.  
XXVI., 13.  
Cmd. 258  
(1919),  
p. 20.

The provisions regarding the mandatory system, as they were finally adopted by the Peace Conference, form Article 22 of the Covenant of the League of Nations, which stands as follows:—

Art. 22 of  
Covenant  
of League  
of Nations.

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage

of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

['A' Mandates.]

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

['B' Mandates.]

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

['C' Mandates.]

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

The Commission referred to in the last paragraph of the Article has been set up by the Council of the League under the name of the Permanent Mandates Commission. It consists of nine members drawn each from a different country, and the majority of whom must be nationals of non-mandatory Powers. The members are selected 'for personal merit and competence' as private individuals. The Commission has a permanent Director and Secretariat.

The Permanent Mandates Commission. Legard, *op. cit.* Panahawo: *Reconstruction*, p. 27.

The annual reports from the Mandatory Powers, for which

Article 22 provides, are considered in the first place by this Commission, and each Mandatory sends a representative to the session of the Commission at which the reports are under discussion to furnish the Commission with any further information it may require. The Commission also deals with any petitions that may be presented (through the Mandatory) by the inhabitants of mandated territory or (on behalf of those inhabitants) from other quarters. The Commission reports to the Council.

Review  
by the  
Assembly  
of the  
League.

The working of the mandate system is further reviewed annually by the Assembly of the League through one of its Committees, which considers the work of the Permanent Mandates Commission; and the report of this Committee may give rise to a debate in the full Assembly. Thus the Fourth Assembly, on the 26th September, 1923, passed the following resolutions:—

Cmd. 2015  
(1924),  
p. 36.

The Fourth Assembly of the League of Nations,  
Having taken cognisance of the Reports of the Permanent Mandates Commission and of the observations of the duly accredited representatives of Australia, Great Britain, Japan, New Zealand and the Union of South Africa,

(a) Expresses its satisfaction with the extensive work which this Commission has so conscientiously accomplished, and with the notable progress made since the last Assembly in the mandated territories;

(b) Requests the Commission to pursue its task with the same zeal and the same impartiality;

(c) Expresses the confident hope that the Commission will continue to enjoy the co-operation of the Mandatory Powers in the work of effecting a continuous improvement in the moral and material condition of the natives, and, in particular, of the women and children, by means of the organisation of general and professional education, the improvement of public health, the equitable remuneration of native labour, and the final abolition within as short a time as possible of slavery in all its forms, including its domestic forms;

See hereon:  
*The Times*  
3 & 10 Sept.,  
1923.

(d) Expresses its regret that the Permanent Mandates Commission has not been able to report that satisfactory conditions have as yet been re-established in the Bondelzwarts district, and the hope that the future reports of the Union of South Africa will contain such information as may allay all misgivings in this connection.

#### The various Mandates and their Terms.

The Mandates granted in respect of the territories referred to in the 4th, 5th, and 6th paragraphs of Article 22 have come

to be known as 'A,' 'B,' and 'C' Mandates respectively. They have been apportioned as follows :

*'A' Mandates.*

For Palestine . . . . .	To Great Britain	<b>Mandated territories and Man- datories.</b>
„ Syria and the Lebanon . . . . .	„ France	
„ Mesopotamia (now called Iraq) . . . . .	„ Great Britain	
(A Mandate for Armenia was refused by the United States, and one for Cilicia by France.)		

*'B' Mandates.*

The Cameroons (five-sixths) . . . . .	To France
„ (remainder, adjoining Nigeria) . . . . .	„ Great Britain.
Togoland (two-thirds) . . . . .	„ France
„ (remainder, adjoining Gold Coast Colony) . . . . .	„ Great Britain.
East Africa (Tanganyika) . . . . .	„ Great Britain.
„ (Ruanda and Urundi) . . . . .	„ Belgium.

*'C' Mandates.*

For South-West Africa . . . . .	To the Union of South Africa.
„ Samoa . . . . .	„ New Zealand.
„ Nauru . . . . .	„ Great Britain, Austra- lia, and New Zealand
„ German New Guinea and German islands in the Pacific south of the Equator other than Samoa and Nauru . . . . .	„ Australia.
„ Yap and other German islands in the Pacific north of the Equator . . . . .	„ Japan.

The various Mandates were drawn up by the Mandatory Powers concerned, and submitted to the Council of the League for approval. The terms of the 'C' Mandates were all approved in December 1920, and those of the 'B' Mandates, and of the 'A' Mandates for Palestine and for Syria and the Lebanon, in July 1922; although the two 'A' Mandates were not brought formally into operation until September 1923.

The Mandate for Mesopotamia (i.e. Iraq) was drafted but was never actually approved by the Council. The main provisions of the draft Mandate were, however, embodied in a 'Treaty of Alliance' between the British and Iraq Governments which was signed in October 1922; and in September 1924, the Council accepted the Treaty and certain undertakings

Approval  
of the  
Mandates  
by the  
Council.

*The L. of N.  
and  
Mandates,  
pp. 14 sq.  
Fanshawe,  
p. 32.*

Position of  
Iraq.  
Cmd. 1500,  
1767, 2317  
& 2370.

*The Times,  
6 June, 1924.*

Monthly  
Summary  
of L. of N.,  
Vol. IV, 191.  
L. of N. and  
Mandates, 16 sq.

by Great Britain in connection therewith, including British assumption of responsibility towards all Members of the League for the fulfilment of the Treaty by Iraq, as giving effect to Article 22 of the Covenant.

### *The 'C' Mandates.*

113 S.P.  
1107 sq.  
1108 S.P. 806.  
Cmd. 1201-  
4 (1921).  
Suppl. to  
Ann. JI. of  
Int. Law,  
Vol. 17,  
p. 188 sq.  
[Recitals.

The five 'C' Mandates are *mutatis mutandis* in the same terms. We give the Mandate for South-West Africa in full:—

The Council of the League of Nations:

Whereas by article 119 of the Treaty of Peace with Germany signed at Versailles on the 28th June, 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights over her overseas possessions, including therein German South-West Africa; and

Whereas the Principal Allied and Associated Powers agreed that, in accordance with article 22, part I (Covenant of the League of Nations), of the said treaty, a mandate should be conferred upon His Britannic Majesty, to be exercised on his behalf by the Government of the Union of South Africa, to administer the territory aforementioned, and have proposed that the mandate should be formulated in the following terms; and

Whereas His Britannic Majesty, for and on behalf of the Government of the Union of South Africa, has agreed to accept the mandate in respect of the said territory and has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions; and

Whereas, by the aforementioned article 22, paragraph 8, it is provided that the degree of authority, control or administration to be exercised by the mandatory, not having been previously agreed upon by the members of the League, shall be explicitly defined by the Council of the League of Nations:

Confirming the said mandate, defines its terms as follows:

### *Article 1.*

The territory over which a mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa (hereinafter called the mandatory) comprises the territory which formerly constituted the German Protectorate of South-West Africa.

### *Article 2.*

Admini-  
stration  
and legis-  
lation.]

The mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modifications as circumstances may require.

The mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present mandate. [Well-being of the natives.]

*Article 3.*

The mandatory shall see that the slave trade is prohibited, and that no forced labour is permitted, except for essential public works and services, and then only for adequate remuneration. [Slave trade ; forced labour ;

The mandatory shall also see that the traffic in arms and ammunition is controlled in accordance with principles analogous to those laid down in the convention relating to the control of the arms traffic, signed on the 10th September, 1919, or in any convention amending the same. arms traffic ;

The supply of intoxicating spirits and beverages to the natives shall be prohibited. [intoxicating beverages.]

*Article 4.*

The military training of the natives, otherwise than for purposes of internal police and the local defence of the territory, shall be prohibited. Furthermore, no military or naval bases shall be established or fortifications erected in the territory. [Native soldiers.]

*Article 5.*

Subject to the provisions of any local law for the maintenance of public order and public morals, the mandatory shall ensure in the territory freedom of conscience and the free exercise of all forms of worship, and shall allow all missionaries, nationals of any State member of the League of Nations, to enter into, travel and reside in the territory for the purpose of prosecuting their calling. [Freedom of conscience and worship ; missionaries.]

*Article 6.*

The mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under articles 2, 3, 4 and 5. [Annual report.]

*Article 7.*

The consent of the Council of the League of Nations is required for any modification of the terms of the present mandate. [Modification of mandate.]

The mandatory agrees that, if any dispute whatever should arise between the mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by article 14 of the Covenant of the League of Nations. Settlement of disputes.]

The present declaration shall be deposited in the archives of the

League of Nations. Certified copies shall be forwarded by the Secretary-General of the League of Nations to all Powers signatories of the Treaty of Peace with Germany.

Made at Geneva the 17th day of December, 1920.

*The 'B' Mandates.*

Cmd. 1794  
(1923).  
Supplet. to  
*Am. J. of*  
*Int. Law* 17,  
pp. 138 sq.,  
116 S.P.  
817 sq.

As regards the 'B' Mandates, the British and French Mandates for the Cameroons and Togoland and the Belgian Mandate for Ruanda and Urundi are in similar terms, with an exception in the case of the two French Mandates in respect of the employment of native soldiers which will be referred to later. The British Mandate for Tanganyika differs from the other five in one or two minor matters, some of which will also be noticed in the course of this Chapter.

**Recitals.**

We take the British Mandate for the Cameroons as an example of the standard type of 'B' Mandate. This opens with the following recitals: (a) That Germany had renounced in favour of the Principal Allied and Associated Powers all her rights over her oversea possessions; (b) That the Principal Allied and Associated Powers had agreed that the Governments of France and Great Britain should make a joint recommendation to the League of Nations as to the future of the Cameroons; (c) That those Governments had recommended that a Mandate to administer, in accordance with Article 22 of the Covenant, the western part of the Cameroons should be conferred upon His Britannic Majesty, and that the Mandate should be in the terms following; and (d) that His Britannic Majesty had agreed to accept the Mandate, and had undertaken to exercise it on behalf of the League of Nations in accordance with the provisions laid down.

Article 1 deals with the demarcation of the boundary between the areas under British and French Mandates, and the Mandate proceeds as follows:—

*Article 2.*

[Peace and  
order, and  
well-being  
of the  
natives.]

The Mandatory shall be responsible for the peace, order and good government of the territory, and for the promotion to the utmost of the material and moral well-being and the social progress of its inhabitants.

*Article 3.*

[Military  
and naval  
bases;  
native  
soldiers.]

The Mandatory shall not establish in the territory any military or naval bases, nor erect any fortifications, nor organise any native military force except for local police purposes and for the defence of the territory.

[The French Mandates for Togoland (Eastern portion) and the Cameroons (Eastern portion) add here :

It is understood, however, that the troops thus raised may, in the event of general war, be utilized to repel an attack or for defence of the territory outside that subject to the Mandate.]

*Article 4.*

The Mandatory :

- (1) shall provide for the eventual emancipation of all slaves, and for as speedy an elimination of domestic and other slavery as social conditions will allow ; [Slavery ;
- (2) shall suppress all forms of slave trade ; slavetrade;
- (3) shall prohibit all forms of forced or compulsory labour, except for essential public works and services, and then only in return for adequate remuneration ; forced labour ;
- (4) shall protect the natives from abuse and measures of fraud and force by the careful supervision of labour contracts and the recruiting of labour ; contract labour ;
- (5) shall exercise a strict control over the traffic in arms and ammunition and the sale of spirituous liquors. arms and liquor traffic.

*Article 5.*

In the framing of laws relating to the holding or transfer of land, the Mandatory shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests of the native population. Land laws.

No native land may be transferred, except between natives, without the previous consent of the public authorities, and no real rights over native land in favour of non-natives may be created except with the same consent.

The Mandatory shall promulgate strict regulations against usury. Usury.

*Article 6.*

The Mandatory shall secure to all nationals of States Members of the League of Nations the same rights as are enjoyed in the territory by his own nationals in respect of entry into and residence in the territory, the protection afforded to their person and property, and acquisition of property, movable and immovable, and the exercise of their profession or trade, subject only to the requirements of public order, and on condition of compliance with the local law. Commercial equality, etc.]

Further, the Mandatory shall ensure to all nationals of States Members of the League of Nations on the same footing as to his own nationals, freedom of transit and navigation, and complete economic, commercial and industrial equality ; except that the Mandatory shall be free to organise essential public works and services on such terms and conditions as he thinks just.

Concessions for the development of the natural resources of the territory shall be granted by the Mandatory without distinction on grounds of nationality between the nationals of all States Members of the League of Nations, but on such conditions as will maintain intact the authority of the local Government.

[Monopolies.

Concessions having the character of a general monopoly shall not be granted. This provision does not affect the right of the Mandatory to create monopolies of a purely fiscal character in the interest of the territory under mandate and in order to provide the territory with fiscal resources which seem best suited to the local requirements; or, in certain cases, to carry out the development of natural resources, either directly by the State or by a controlled agency, provided that there shall result therefrom no monopoly of the natural resources for the benefit of the Mandatory or his nationals, directly or indirectly, nor any preferential advantage which shall be inconsistent with the economic, commercial and industrial equality hereinbefore guaranteed.

The rights conferred by this article extend equally to companies and associations organised in accordance with the law of any of the Members of the League of Nations, subject only to the requirements of public order, and on condition of compliance with the local law.

#### *Article 7.*

Freedom of conscience and worship; missionaries.

The Mandatory shall ensure in the territory complete freedom of conscience and the free exercise of all forms of worship which are consonant with public order and morality; missionaries who are nationals of States Member of the League of Nations shall be free to enter the territory and to travel and reside therein, to acquire and possess property, to erect religious buildings and to open schools throughout the territory; it being understood, however, that the Mandatory shall have the right to exercise such control as may be necessary for the maintenance of public order and good government, and to take all measures required for such control.

#### *Article 8.*

International Conventions.

The Mandatory shall apply to the territory any general international conventions applicable to his contiguous territory.

#### *Article 9.*

Administration and legislation.]

The Mandatory shall have full powers of administration and legislation in the area subject to the mandate. This area shall be administered in accordance with the laws of the Mandatory as an integral part of his territory and subject to the above provisions.

The Mandatory shall therefore be at liberty to apply his laws to the territory under the mandate subject to the modifications required by local conditions, and to constitute the territory into a customs, fiscal or administrative union or federation with the adjacent

territories under his sovereignty or control, provided always that the measures adopted to that end do not infringe the provisions of this mandate.

Articles 10, 11, and 12 correspond to Articles 6 and 7 of the ' C ' Mandates as given above.

Annual  
report ;  
modification  
of  
Mandate ;  
Disputes.

### *The ' A ' Mandates.*

The ' A ' Mandates all relate to territories which previously belonged to Turkey, and which are more advanced than those covered by the other Mandates.

It was not possible in the Mandates for Palestine and for Syria and the Lebanon to say, as in the cases of the ' B ' and ' C ' Mandates, that the territories had been renounced by their former sovereign, as the Treaty of Sèvres was never ratified, and the Lausanne Conference had not opened when these two Mandates were approved by the Council of the League, or when the Anglo-Iraq Treaty was signed. Each Mandate, however, recites that the territory in question 'formerly belonged to the Turkish Empire,' and that the Principal Allied Powers (the United States did not declare war against Turkey) had decided to entrust its administration to the Mandatory, who had agreed to exercise the Mandate on behalf of the League of Nations.

Recitals.

See p. 251  
above.

A number of provisions are common to the Mandates for Palestine and Syria and to the Iraq Treaty and the connected undertakings entered into by Great Britain with the Council ; some are special to one or two of those instruments. The more important provisions are to the following effect.

Cmd. 1785 &  
1787  
Suppl. to  
Ann. Jl. of  
Int. Law, 17,  
pp. 184, 177.  
116 B.P.  
839-50.

In Palestine, the Mandatory is to have 'full powers of legislation and of administration,' subject to the terms of the Mandate. The Mandate for Syria and the Iraq Treaty provide for the framing of an organic law, which is to take into account the rights, interests and wishes of all the populations inhabiting the respective territories.

Legisla-  
tion and  
admini-  
stration.

In Palestine and in Syria and the Lebanon local autonomy is to be encouraged, and the progressive development of Syria and the Lebanon as independent States is to be facilitated.

Local  
autonomy  
and ulti-  
mate inde-  
pendence.

The Anglo-Iraq 'Treaty of Alliance' leaves the government of the country to King Feisal, subject to the conditions of the Treaty, and with the advice and assistance of Great Britain, but such advice and assistance are to be without prejudice to the national sovereignty of the State of Iraq.

Great Britain is to use her good offices to secure the admission of Iraq to membership of the League of Nations as soon as possible; and, by a later protocol, the Treaty is to terminate upon Iraq's becoming a Member of the League and, in any case, not later than four years from the ratification of peace with Turkey. If Iraq has not been admitted to the League when the Treaty comes to an end, the Council of the League, according to the arrangement made with that body by Great Britain, is to be invited to decide 'what further measures are required to give effect to Article 22 of the Covenant.' The decision of the Council of the League of the 16th December, 1925 (which defines the Turco-Iraq frontier in such a way as to attribute the Mosul vilayet to Iraq) is, however, made conditional on Great Britain's entering into a new Treaty with Iraq for ensuring the continuance of the mandatory régime, as defined by the Anglo-Iraq Treaty of Alliance and the British undertaking to the Council, for twenty-five years unless, before the expiration of this period, Iraq is admitted as a Member of the League.

Cmd. 2120.

*Monthly  
Summary  
of the L. of  
N.*, Vol.  
IV., p. 192.  
Cmd. 2317  
(1926).

Cmd. 2562  
(1926).

*The Times*  
17, 18 & 22 Dec.,  
1926.

No territory to be transferred.

Pre-existing privileges of foreigners.

Foreign relations; protection of natives abroad.

Military forces and movements.

In each case, none of the mandated territory is to be 'ceded or leased to, or in any way placed under the control of, the Government of any foreign Power.'

The privileges and immunities of foreigners, including those enjoyed by capitulation or usage, are to remain in abeyance in each case while the Mandate or the Treaty respectively remains in force.

The control of the foreign relations of Palestine and Syria is entrusted to their respective Mandatories, who may afford diplomatic and consular protection to citizens of the territory when abroad. The King of Iraq is to have the right of representation in London and in such other capitals and places as may be agreed upon with Great Britain. He is to issue exequaturs to representatives of Foreign Powers in Iraq after their appointment has been agreed to by Great Britain. Where he is not represented, the protection of Iraq nationals is entrusted to Great Britain.

Forces may be organized in Palestine ('on a voluntary basis') and in Syria and the Lebanon for the preservation of peace and order and the defence of the respective territories; but such local forces are not to be used for other purposes 'save with the consent of the Mandatory.' Under the Iraq Treaty, Great Britain undertakes to provide such support and assistance to the armed forces of the King of Iraq as may from time to

time be agreed upon. The roads, railways, and ports of Palestine and of Syria and the Lebanon may be used at all times by the respective Mandatories for the movement of armed forces, supplies and fuel.

Freedom of conscience and of religious worship are to be ensured to all. Antiquities are to be specially protected.

There is to be no discrimination against the nationals or companies of any State Member of the League of Nations in matters concerning taxation, commerce, or navigation, the exercise of industries or professions, or the treatment of merchant vessels or civil aircraft. The Administration of Palestine may arrange with the Zionist Organization, or another appropriate Jewish agency, to operate public works and to develop the natural resources of the country; but the profits distributed by such agency are to be limited. The Syrian Mandate contains provisions regarding concessions and monopolies which are borrowed from the 'B' Mandates, and correspond to the third and fourth paragraphs of Article 6 of the Cameroons Mandate given above.

Palestine is to be administered with a view to the establishment of 'a national home for the Jewish people,' but nothing is to be done 'which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.' Jewish immigration and settlement are to be facilitated, as is also the acquisition of Palestinian citizenship by Jews who take up their permanent residence in the country. There are special provisions regarding the Holy Places and religious buildings or sites. Certain provisions of the Mandate, particularly those concerned with Palestine as the Jewish national home, have not been applied to the territory known as Trans-Jordan.

In the event of the termination of the Palestinian and Syrian Mandates, the Council of the League is to use its influence to secure the fulfilment by the Government of Palestine or of Syria and the Lebanon, as the case may be, of the financial obligations legitimately incurred by the Administration of the country during the period of the Mandate.

In each of the two Mandates there are the usual provisions for an annual report to the Council; for the submission to the Permanent Court of International Justice of disputes relating to the interpretation or the application of the provisions of the Mandate; and for the consent of the Council to any modifica-

Freedom of conscience and worship; antiquities.

Commercial, etc., equality.

Monopolies and public works, and concessions.

Palestine as a Jewish home.

Holy Places.

Trans-Jordan. 116S.P.849.

Financial obligations on the termination of the Mandate.

Annual reports; settlement of disputes; modifications of the Mandates.

Cmd. 2917  
(1925).  
*Monthly  
Summary  
of L. of N.*,  
IV., p. 191.

tion of the terms of the Mandato. And Great Britain has given similar undertakings to the Council under each of these heads in connection with her Iraq Treaty.

#### The provisions of the Mandates and existing Law and Practice.

The obligations accepted by the Mandatories are, to a large extent, made up of duties which, as we shall see in Part IV, are already recognized and performed by modern Colonial Powers. In certain respects, however, these obligations go beyond what is required by the general law or for conformity with modern practice. Among the matters of a general character which are peculiar, or have special application, to mandated territories, the following may be noticed.

**Non-forti-  
fication.**

In the first place, the 'B' and 'C' Mandates specially prohibit the fortification of the mandated territory, and the establishment of military and naval bases there.

**Native  
military  
forces.**

Under the general law, there is nothing to prevent a Colonial Power from arming and training natives for use outside the territory in which they were recruited—large numbers of native troops were employed in Europe during the War. All the Mandates, however, either expressly or by clear implication, prohibit the military training of the natives except for police purposes and the defence of the Mandated territory.

**Baker:  
Woodrow  
Wilson, etc.  
Ch. XXIV.**

The permission given in the two French 'B' Mandates for 'troops thus raised' in the mandated areas in question to be used for the defence of other territory would seem, as indeed was pointed out by the Secretariat of the League of Nations, to be inconsistent with the fifth paragraph of Article 22 of the Covenant. It represents, however, a position from which the French representatives refused to be moved when these provisions of the Article were under discussion at the Peace Conference.

The stipulation in the Palestinian and Syrian Mandates that the forces raised for the preservation of peace and order and the defence of the territory are not to be used by the Administration in each case for other purposes without the consent of the Mandatory Power would also seem to imply that the Mandatory Power may use, outside the territory and for other purposes, the troops raised in the territory for the local purposes mentioned. There is no express prohibition in Article 22 of the Covenant against such a use of troops raised in 'A' Mandate territories. It would probably, however, in most cases, be

found difficult to reconcile their employment in this way with the trustee principle enunciated in the Article.

In any case, in neither the 'A' Mandate nor the two French 'B' Mandate territories would it seem to be permissible for the Mandatory to raise more native troops, all told, than are required for the maintenance of order and the defence of the territory. The Palestine Mandate authorizes the organization of the forces necessary for this purpose 'on a voluntary basis'; but in no other Mandate is there an express or implied prohibition of compulsory recruitment.

Art. 17.

In connection with the question whether natives of a mandated territory might be recruited for service in an armed force belonging to a neighbouring country, a detachment of which might be temporarily quartered in the mandated area, the Permanent Mandates Commission have decided 'that the spirit of the mandate would be violated if natives were enlisted for service in a military corps which was not permanently quartered in the territory and used solely for its defence or the maintenance of internal order' (except as provided in the Mandates for the French Cameroons and French Togoland). The British and French Governments have also accepted the view that natives of a mandated territory should not be enlisted in their Forces outside the territory.

Recruitment of natives into external forces.  
*Monthly Summary of L. of N.*, IV., p. 144.  
Permt. Mandates Comm.; *Report* A. 15, 1924, VI.  
*See also per Mr. Thomas: House of Commons*, 1.7.24.

It has been pointed out that the provisions which permit the ports, roads, and railways of Palestine and of Syria and the Lebanon to be used at any time by the Mandatory for the passage of troops and supplies, and those which allow troops raised in those areas to be used for non-local purposes, would bring those countries into any war in which the Mandatory was a belligerent. A similar result would apparently follow in the cases of French Togoland and the French Cameroons from the provisions which allow locally-raised troops to be used by the Mandatory elsewhere.

Neutrality of mandated territory.  
Lewis: *Law Quarterly Review*, 39, p. 458.  
Lugard, *op. cit.*

As regards other mandated territories, although it is difficult to see that the duties of trusteeship, to which all the Members of the League have subscribed, are consistent with the embroiling of the natives in a war between, say, two European Powers, it may be doubted whether the principle would, in that respect, stand the test of a European war; and if mandated territories are intended to remain neutral in such a contingency, it would appear that definite undertakings should be entered into to that end.

It is only in the case of 'B' Mandate territories that Article 22 specifically mentions equal opportunities for the trade and

Equality of commercial opportunity, etc.

*But see*  
Dr. Baly in  
*Brit. Year*  
*Book of Int.*  
*Law*, 1921-  
2, p. 120.

commerce of all the Members of the League, as it is doubtful if such equality of opportunity should be regarded as one of the safeguards 'in the interests of the indigenuous population' which are required to be provided for in the 'C' Mandates. In any case, the 'C' Mandates contain no such provisions. On the other hand, the 'A' Mandates have provisions on this head which are comparable with those in the 'B' Mandates.

*Suppt. to*  
*Am. Jl. of*  
*Int. Law*, 17,  
p. 163.

The Japanese Government urged that the inclusion in the 'C' Mandates of a provision assuring equal opportunity for trade and commerce was required by 'the fundamental spirit of the League of Nations' and the interpretation of the Covenant; and in assenting to the issue of the 'C' Mandates they expressly stipulated that their agreement was not to be taken as an acquiescence 'in the submission of Japanese subjects to a discriminatory and disadvantageous treatment in the mandated territories.'

*Settlement*  
*of disputes.*

The provision made in all the mandates for the submission to the Permanent Court of International Justice of any disputes between a Mandatory and another Member of the League of Nations, relating to the interpretation or the application of the provisions of the Mandate, would appear to give the Court compulsory jurisdiction in all such cases. This broad provision would apparently cover any claims that might be put forward by Members of the League in respect of infractions of rights claimed by their nationals under a Mandate; and the express statement in the Tanganyika Mandate that such claims may be brought before the Court would seem, therefore, to be superfluous.

Art. 13.

*Modification*  
*of the*  
*terms of a*  
*Mandate.*  
*See p. 282*  
*below.*

Each mandate requires the consent of the Council of the League of Nations to any modification of its terms. Thus the variation in the boundary between the British and Belgian mandated areas in East Africa as laid down in the Mandates, was made with the consent—in fact, at the suggestion—of the Council. It would appear that any modifications so made should be only in the nature of detail changes within the provisions of Article 22, as those provisions form part of the Covenant of the League, and amendments to them can therefore take effect only in the circumstances laid down in Article 26 of the Covenant, i.e. when they have been ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly. The United States would also probably claim that their consent was requisite to any substantial change in the terms of a Mandate.

*See p. 265*  
*below.*

**Nature and Seat of the Sovereignty over Mandated Territory.**

At the meeting of the Council of the League of Nations held on the 28rd April, 1923, there seems to have been general agreement with the view expressed by Mr. Branting, 'that the Mandatory Powers have not full sovereignty over the territories entrusted to their care by the League of Nations.' What the members of the Council had in mind was, doubtless, the fact that the sovereignty of the Mandatories is restricted by the terms of their respective mandates; and it does not appear to be necessary to read into this opinion any suggestion that there is a part of the sovereignty over mandated territory existing elsewhere than in the Mandatory.

*Monthly Summary of the L. of N.* Vol. III., p. 82.  
See Wright, Q.: *Sovereignty of the Mandates.* *Ann. J. of Int. Law*, Vol. 17, p. 601; and Vol. 18, p. 306.

If any such sovereignty is vested elsewhere, it can only, it would seem, be (a) in the communities over which the mandates are exercised, or (b) in the Allied and Associated Powers jointly, or (c) in the League of Nations. We will consider each of these possibilities in turn.

*(a) No sovereignty in the native authorities, except in Iraq.*

As regards the native communities, it would appear that, in all cases except that of Iraq, the internal administration, no less than the external sovereignty, is so completely under the control of the Mandatory State that there is no room for any sovereignty in any native authority.

All the 'B' and 'C' Mandates, with the exception of the British Mandate for Tanganyika, provide that the mandated territory is to be administered as an integral portion of the territory of the Mandatory—a provision which, in Article 22, is applied to 'C' Mandate territories only, and that on account of their peculiar condition, size or position—while Tanganyika, subject to the terms of the mandate, may be constituted 'into a customs, fiscal and administrative union or federation with the adjacent territories' under British sovereignty and control.

Cmd. 1794 (1923), Art. 10.  
Cmd. 1785 (1922), Art. 1.

The Palestine Mandate expressly allows to the Mandatory 'full powers of legislation and of administration' subject to the terms of the Mandate; and although there is not the same express provision in the Mandate for Syria and the Lebanon, the position in that case does not seem to be materially different. It is true that both these Mandates are contemplated as being of a temporary nature, not only in the fourth paragraph of Article 22, but also in the Mandates themselves, which refer to their own expiration, to the encouragement of local autonomy,

and to the development of self-governing institutions. But whatever developments in the direction of self-government and independence may take place in the future, it does not appear possible to trace any sovereignty in the native authorities at present.

Iraq.

In Iraq the position is different. The advice and assistance which Great Britain is to provide under the Treaty are to be without prejudice to the national sovereignty of Iraq, and the King of Iraq is left with wide powers of internal government. In certain important matters, however, including the King's representation abroad, his reception of representatives of Foreign Powers, and his appointment of gazetted foreign officials, the King can take action only with the concurrence of the British Government; and it would appear that, at present, the sovereignty over Iraq is divided between His Britannic Majesty and the King of Iraq.

*(b) No sovereignty in the Allied and Associated Powers collectively.*

No doubt at one time the sovereignty over these territories was in the Principal Allied and Associated Powers jointly. Thus, the German colonies were relinquished in the Treaty of Versailles 'in favour of the Principal Allied and Associated Powers,' (i.e. the British Empire, the United States, France, Italy, and Japan). But those Powers allotted the mandates directly to the Mandatories, and it would appear that they thereby parted with the sovereignty. The Supreme Court of South Africa, indeed, appears to have adopted the view that the sovereignty over the ex-German colonies never passed to the Principal Powers. 'There was no cession,' runs the judgment of Chief Justice Innes, 'of the German possessions to the Principal Powers: there was merely a renunciation in their favour in order that such possessions might be dealt with in accordance with the terms of the Covenant.'

As regards the ex-Turkish territories, the mandates were allotted by the victorious Powers, and the terms of the mandates for Palestine and for Syria and the Lebanon were approved by the Council of the League, before the Peace Treaty of Lausanne was signed in July, 1923. And although those mandates did not come formally into operation until after the date of the Treaty, the respective territories had been administered in accordance with their terms for some time previous to that date.

The Treaty of Lausanne does not include the Covenant of

Art. 119.  
*The L. of  
N. and  
Mandates*,  
p. 12.  
*See Cmd.*  
*1022 (1920),*  
*6.*

*Jacobus  
Christian  
v. Rep.,  
Brit. Year  
Book of  
Int. Law,*  
*1925, p. 211.*

*Fanshawe,*  
*p. 32.*

the League of Nations with its Article 22, nor does it contain, as did the unratified Treaty of Sèvres, a provision that the countries in question should be 'provisionally recognised as independent States subject to the rendering of administrative advice and assistance by a Mandatory.' On the whole, it would appear that the ex-Turkish territories should be regarded as having passed to the victorious Powers jointly by virtue of the principle of *uti possidetis*, and from those Powers to the respective Mandatories, before the date of the Treaty of Lausanne; and that the Turkish renunciation of all title to these territories in the Treaty—accompanied as it is by the proviso: 'the future of these territories . . . being settled or to be settled by the parties concerned'—amounts merely to a recognition of that fact.

Cmd. 864  
(1920),  
Art. 91.

But see  
Lugard,  
*op. cit.*  
See Ch.  
XX, above.

See Cmd.  
2317 (1925),  
p. 9.  
Cmd. 1920  
(1923),  
Art. 18.

(c) *No sovereignty in the League.*

The mandated territories have thus passed from the Principal Allied and Associated Powers to the Mandatory States without the interposition of the League, and it would not appear that any of the sovereignty has ever been vested in the League. Iraq has been recognized by the British Government as a sovereign State in what may perhaps be called subordinate but temporary alliance with Great Britain; and this important recognition has been given in Agreements made between Great Britain and the King of Iraq (whom Great Britain had previously recognized as such) and to which the League is not formally a Party.

See p. 257  
above.

See hereon:  
*The L. of N.*  
and  
*Mandates*,  
p. 17.

It is true that the terms of the mandates have been approved by the Council of the League in each instance, and that the Mandatory Powers have agreed to exercise their mandates on behalf of the League and in accordance with the terms laid down. But the League would appear to have been introduced mainly, if not entirely, for the purpose of providing the 'securities' mentioned in Article 22 of the Covenant for the performance of the trust which the Mandatory State has accepted on behalf of the natives; and the annual report which the Mandatory must make to the Council of the League would seem to be only a method (although a most valuable and effective method) of ensuring that the sanction of public opinion shall be brought to bear in case of any failure on the part of the Mandatory State to carry out the trust it has undertaken.

The United States, although not a Member of the League of Nations, have always claimed that, being one of the victorious

The U.S. and  
Mandates.

114 S.P. 304.  
116 S.P. 630  
& 1037.  
Cmd. 1226.  
Lugard, *op. cit.*  
*L. of N. and*  
*Mandates*,  
p. 16.  
*Am. Jl. of Int.*  
*Law*, 18, p. 243.

Suppl. to  
*Am. Jl. of*  
*Int. Law* :  
16, p. 94 ;  
18, p. 189 ;  
19, pp. 1 &  
89.  
116 S.P.  
1031.

See p. 253  
*above*.

#### Replace- ment of a Mandatory.

Smuts :  
pp. 20-22.  
Baker :  
III, 108 *sq.*  
See Lugard :  
*u.s.* p. 539 ; &  
E. Africa  
Commn.'s Rep.  
Cmd. 2387  
(1925), p. 115.

Powers, their consent is necessary to the exercise of the mandates, and they have required to be consulted as to their terms. The United States Government have also protested against the limitation throughout the mandates of certain privileges to States who are Members of the League of Nations ; and they have claimed that United States Companies have a right to share in the oil concessions in mandated territory.

In certain cases, the United States have made a separate treaty with the Mandatory State dealing with the exercise of the mandate. That made with Japan in respect of the ex-German islands in the Northern part of the Pacific Ocean, for example, consents, on the one hand, to the administration of the islands by Japan according to the terms of the mandate (which it recites) ; and stipulates, on the other hand, among other things, that the United States and its nationals shall receive all the benefits of the engagements of Japan defined in Articles 3, 4, and 5 of the mandate, notwithstanding the fact that the United States is not a Member of the League ; that the Mandatory shall address to the United States a duplicate of the annual report to the Council of the League ; and that nothing contained in the treaty is to be affected by a modification of the Mandate without the express consent of the United States.

The mandates contain no provision for the replacement of a Mandatory at the will of the League of Nations, although General Smuts's original proposal, and President Wilson's second and third drafts of the Covenant, contemplated such a possibility. The Commonwealth Government have stated that they do not admit the power of the League to revoke a mandate without the consent of the Mandatory ; and there is probably no such power either in the League or in the Principal Allied and Associated Powers. Moreover, the power of the Permanent Court of International Justice, on the reference to it of a dispute 'relating to the interpretation or the application of the provisions of the mandate,' as provided in each mandate, would seem not to extend to revocation.

#### *The Sovereignty in the Mandatory.*

See as regards  
Iraq, p. 264  
*above*.  
See *Jacobus*  
*Christman v.*  
*Rev. (S. Africa)*  
*Brit. Year Book*  
*of Int. Law*,  
1926, p. 211.

In short, it would appear that, in all cases except that of Iraq, the whole of the existing sovereignty, *de jure* as well as *de facto*, is in the Mandatory State, but that that sovereignty is limited by the conditions laid down in the respective mandates. Those conditions, as we have noticed, in so far as they are contained in Article 22 of the Covenant, can be altered only in

## SOVEREIGNTY OVER MANDATED TERRITORY 267

the way provided for making amendments to that instrument ; and the restrictions imposed upon the sovereignty of the Mandatory would not appear to be different in kind from such limitations upon sovereignty as are set by general International Law.

### *Mandated Territory is not National Territory of the Mandatory.*

But even where the whole of such sovereignty as exists over mandated territory is in the Mandatory, that sovereignty is not of the full and complete order which a State possesses over its own territory ; and the position is, in many respects, analogous to that of a protectorate in which the internal as well as the external sovereignty has passed to the Protecting Power.

*See p. 203 above.*

Commercial and other conventions made by the Mandatory do not apply to mandated territory unless they are expressly extended to it ; and the benefit of most-favoured-nation treatment enjoyed by protectorates of a Mandatory State has been refused to contiguous mandated territory.

*Lugard :  
N. S. at  
p. 546.*

Natives of the territory are not nationals of the Mandatory State ; although, by express provision in the case of the 'A' Mandates and, it would seem, from the necessities of the case, and by analogy with a protectorate, in the others, the Mandatory State may (and apparently should) extend its protection to citizens of the territory when abroad. On this question, the Council of the League at its twenty-fourth Session on the 23rd April, 1923, adopted the following resolution :—

(1) The status of the native inhabitants of a mandated territory is distinct from that of the nationals of the Mandatory Power and cannot be identified therewith by any process having general application.

*Monthly  
Summary of  
the L. of N.  
Vol. III.,  
p. 82.*

(2) The native inhabitants of a mandated territory are not invested with the nationality of the Mandatory Power by reason of the protection extended to them.

*Ann. of  
Int. Law,  
18, p. 306.*

(3) It is not inconsistent with (1) and (2) above that individual inhabitants of the territory should voluntarily obtain naturalisation from the Mandatory Power, in accordance with arrangements which it is open to such Power to make with this object under its own law.

(4) It is desirable that native inhabitants who receive the protection of the Mandatory Power should in each case be designated by some form of descriptive title which will specify their status under the mandate.

*See hereon:*  
*Brit. Year*  
*Book of*  
*Int. Law,*  
*1925,*  
*p. 188.*

At the same Session, the Council recognized that the position of the 7,000 German colonists in what was formerly German South-west Africa was of a special nature and called for separate treatment, and they declared that they saw no objection to the proposal of the South African Government to naturalize those 7,000 people collectively, on the understanding that any individual would have the right to decline South African nationality without suffering any consequent embarrassment.

#### Termination of a Mandate and of the Status of 'Territory under Mandate.'

*See per*  
*Mr. Baldwin*  
*and Mr. Amery,*  
*H. of Commons,*  
*21 Dec., 1925,*

We have seen that there appears to exist no power to revoke a mandate against the will of the Mandatory. Nor, it would seem, can a Mandatory relinquish its mandate without the consent of the Council of the League. A Mandatory which, without such consent, laid down its task, or which failed to carry out its mandate according to the terms thereof, would thereby commit a breach of the undertaking it has given to the other Members of the League, and would be in the position of a treaty-breaking or law-breaking State.

*See pp. 251*  
*& 257-8*  
*above.*

The case of Iraq lends no support to a contrary view. No mandate for Iraq had been approved by the Council of the League when the British and Iraq Governments agreed together to set a definite term to their mutual 'Treaty of Alliance.' Moreover, when that Agreement, together with certain undertakings by Great Britain, were accepted by the Council as the equivalent of a mandate, it was arranged that if Iraq has not been admitted to the League when the Treaty comes to an end, the Council is to be invited 'to decide what further measures are required to give effect to Article 22 of the Covenant.'

*Cmd. 2317*  
*(1925).*

But while the consensus of the Council and the Mandatory would appear to be sufficient to terminate a particular mandate, it does not necessarily follow that such a consensus would be sufficient to release a country under mandate from the mandatory system altogether.

In the case of 'A' Mandate countries, 'their existence as independent nations' is 'provisionally recognised' in Article 22 of the Covenant, 'subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone'; and it may be that, in those cases, not only a particular mandate, but the application of the mandatory system altogether, could be terminated by agree-

ment between the Council and the Mandatory; or by the admission of the mandated country to the League, with the assent of the Mandatory, as is contemplated in the case of Iraq. And even without the assent of the Mandatory, a two-thirds vote of the Assembly admitting an 'A' Mandate country to membership of the League under Section 1. of the Covenant would appear to amount to a declaration that, in the opinion of the majority of the Assembly, the mandated country had reached a condition in which it was 'able to stand alone,' and therefore might claim to dispense with the administrative advice and assistance of the Mandatory.

Cmd. 2317  
(1926).

In the cases of 'B' Mandate and 'C' Mandate territory, however, Article 22 does not appear to contemplate the termination of the status of 'territory under Mandate.' Any change in that status would thus probably require to be made in the manner laid down in Article 26 for making amendments to the Covenant, and perhaps also with the consent of the United States.

See pp. 262  
& 265 above.

No  
boundaries  
or no  
precise  
boundaries  
fixed.  
As to  
U.S.A.  
boundaries,  
See  
Douglas :  
U.S. Geo-  
logical  
Survey  
Bulletin,  
689.

Cases arise, however, in which no notification as to the limits of the area affected has been made, or in which the boundary is indefinite in places. Such boundaries are usually settled by agreement between the States concerned. To meet cases where no such agreement has been reached, various principles have from time to time been propounded, and will be considered in this Chapter. Some of those are still good law. Others, as will be noted when they are reached, have become obsolete or have never secured acceptance.

### *Natural Boundaries.*

In some cases, a particular tract of land has been provided with natural boundaries which mark it out as a territorial unit.

99 S.P. 930.  
Cd. 2168  
(1904).

Thus the King of Italy, in his arbitral award of the 6th June, 1904, with regard to the boundary between British Guiana and Brazil, held

That the effective possession of a part of a region, although it may be held to confer a right to the acquisition of the sovereignty of the whole of a region which constitutes a single organic whole, cannot confer a right to the acquisition of the whole of a region which, either owing to its size or to its physical configuration, cannot be deemed to be a single organic whole *de facto*.

*De iure, etc.*  
II., VIII.,  
XII. (i).  
Wolf, II.  
II. XII.  
Pinheiro-  
Ferreira,  
II. § 17.  
Curzon :  
*Frontiers*,  
13 *sq.*  
See also the  
Colombia-  
Venezuela  
Boundary  
Award,  
83 S.P. 387.  
83 S.P. 27.

Grotius lays down that, in a doubtful case, territories are supposed to be bounded by natural limits.

See  
C.-3434  
(1897).  
85 S.P. 85.

83 S.P. 19.

There is always an advantage in adopting such boundaries for political purposes. The sea, rivers, lakes, deserts, and mountain ranges are natural features which lend themselves more or less readily to the formation of political boundaries, and have been frequently used in this connection. Good examples of their use are to be found in the treaties made, in June 1891 and June 1893 between Great Britain and Portugal, and in March 1891 between Great Britain and Italy, defining their respective spheres of influence in East Africa. In the earlier Portuguese treaty, the boundaries are determined to a considerable extent by reference to the mid-channels, mouths and confluences of rivers, the shores of lakes, the watershed between rivers and between a river and a lake, and the upper part of the slope of a plateau; and the later Portuguese treaty provides that, pending actual delimitation, 'all natural lines of demarcation' specified in a part of the former treaty shall be considered to constitute the boundary. In the Italian treaties, the courses of rivers are employed in conjunction with

parallels of latitude and meridians of longitude, and, where the line follows a parallel or a meridian, it may be altered in detail 'd'après les conditions hydrographiques et orographiques de la contrée.' A provision similar to that last mentioned is frequently to be found in treaties for the settlement of boundaries.

In the British Guiana-Venezuela Boundary Arbitration, to which we have already referred at some length, both Great Britain and Venezuela took the view that the position of natural features should form an important consideration in fixing the boundary line.

Venezuela not only put forward the untenable claim that Guiana as a whole formed a geographical unit, but she also maintained that certain parts of it formed geographical and political units 'the material occupation of a part of which, by the nation first discovering and exploring it, is in law attributive and constructive possession of the whole.' One of these units was the Cuyuni-Mazaruni Basin, bounded on the north by the Imataca Mountains; on the east by the Blue Mountains, by the lowest falls of the Cuyuni and Mazaruni Rivers, and by the Ayanganna Mountains; on the south by the Ayanganna and Pacaraima Mountains; and on the west by the divide separating the waters of the Caroni and Orinoco Rivers from the waters of the Cuyuni and Mazaruni Rivers. But Great Britain denied that this region was a geographical or political unit.

Great Britain laid down that 'a natural feature to make an efficient frontier boundary between States should fulfil the following two main conditions: it should be easy to distinguish, and, it should be difficult to cross.' She claimed that it was not possible 'to suggest any other boundary between Venezuela and British Guiana based on physical features so well marked' as those along the course of the Schomburgk line. The length of this line, from the Orinoco to the source of the Corentin was, she stated, 1025 miles; 'of this, 460 miles follow well-marked water-partings, and the remaining 565 miles follow well-marked river-courses.'

We will now consider where the boundary line is presumed to run in certain standard cases.

### *The Air Space.*

In the first place, the Allied and Associated Powers assembled at Paris in 1919 laid down the principle that 'every Power has complete and exclusive sovereignty over the air space above

*See, e.g.,*  
86 S.P. 977.  
107 S.P. 348  
116 S.P.  
823 & 831.

**British  
Guiana  
and  
Venezuela.**  
*See Ch.*  
**XIX.**  
*above.*  
C.-9501  
(1899),  
213.

C.-9337  
(1899),  
133 *sq.*

C.-9336  
(1899),  
146 *sq.*

112 S.P. 934  
*And see Law  
Journal*  
2. 11. 12.

its territory ' and above the territorial waters adjacent thereto. The States concerned however agreed, in time of peace, to accord freedom of innocent passage above their respective territories to the aircraft of the other contracting States, subject to their right to regulate such passage, and to prohibit passage over certain areas for military reasons or in the interest of public safety.

*The Shores of the Ocean.*

See Ch. VII.  
above.

See Ch.  
II. above.  
Hall II. II.,  
p. 149.

Norway-  
Sweden  
Boundary  
Award.  
102 S.P. 948  
See also  
106 S.P. 978.

We have already considered how far the maritime belt appurtenant to territory extends over the ocean, and how its width may vary with certain configurations of the adjoining land. That width is ordinarily measured from low-water mark ; but when there are islands off the coast, or lagoons, or banks covered only by shoal water, it may be proper to measure it from the islands or banks or the seaward edge of the lagoons.

Where the possessions of two States adjoin on the coast, the boundary between the two is drawn across the maritime belt perpendicularly to the general direction of the coast on the two sides of the territorial boundary.

*Islands.*

Lawrence,  
§ 74.  
Field, § 39.  
Bonfil,  
§ 553.

F.O. Hand-  
books, Nos.  
42, 84 and  
88.

Douglas :  
U.S. Geo-  
logical  
Survey  
Bulletin  
689, p. 2.

Where a State has taken effective possession of part of an island of moderate dimensions not hitherto under the sovereignty of a member of the International Family, the general opinion is that it has thereby acquired a contingent title to the whole island, which it can render absolute by extending its authority over the rest of the island within a reasonable time. Such a rule, however, does not apply to large islands. The Dutch, for example, had long been established in the western part of New Guinea, when Great Britain and Germany between them annexed the eastern half of that island ; and the fact that Dutch sovereignty had been established over the greater part of Borneo did not prevent Great Britain from extending her protection over the States of Sarawak, Brunei and British North Borneo in the north and west of the island.

An island in the middle of a river should, it would seem, in the absence of stronger grounds of title, appertain to the State owning that half of the river in which the larger part of the island is situated.

*Mountains and the Water-divide.*

Bluntschli,  
§ 297.

Mountain ranges form at once a permanent line of demarcation and a barrier against invasion. The slopes up to the

summits are presumed to belong to the same State as the adjoining country, and the boundary is the watershed or water-divido. As an example of the application of this principle, it may be noted that the policy of the Government of India has been to make the north-eastern boundary of the Indian Empire coincide with the physical watershed; thus, in the Treaty of the 17th March, 1890, between Great Britain and China, it was agreed that 'the boundary of Sikkim and Tibet shall be the crest of the mountain range separating the waters flowing into the rivers of Sikkim and Tibet respectively. The water-parting is not always the same as the line of the highest crests. In the case of a plateau, it does not, as a rule, coincide with the edge of the table or crest of the slope.

In the Convention of February 1825 between Great Britain and Russia it was provided that the boundary between Alaska, which then belonged to Russia, and British territory in North America should, for a considerable distance, follow the summit of the mountains situated parallel to the coast. Whenever the summit of these mountains should prove to be at a distance of more than ten marine leagues from the ocean, the boundary was to be formed by a line parallel to the sinuosities of the coast, which should never exceed ten marine leagues therefrom. In 1867, Russia ceded all her American territory to the United States, and the position of the boundary line formed the subject of an arbitration between Great Britain and the United States in 1908.

The United States contended that, as there was no continuous chain of mountains within the prescribed distance from the coast, it was necessary to fall back on the ten league limit. Great Britain, on the other hand, urged that there was no necessity for a continuous range; and that as there were mountains from 8000 to 5000 feet high within five or six miles of the coast for the entire distance, the boundary should be drawn by a straight line from the summit of one mountain to the summit of the next. In their Award, the arbitrators did not adopt either the line proposed by Great Britain or that put forward by the United States. With regard to the greater part of the distance for which the line was to follow the summit of the mountains, they were able to identify the mountains referred to, although for the rest of that distance the evidence was insufficient to enable them to complete the line.

Pinkshro-  
Ferreira,  
II. § 17.  
Curzon:  
*Frontiers*,  
17 sq.

For Lord  
Curzon:  
*The Times*,  
16. 1. 12.  
C.-7312  
(1894).

Hershey, 175.  
Monica  
Arbitra,  
C.-8434  
(1897).  
89 S.P. 714 sq.

**The Alaska  
boundary.**  
Pitt  
Cobbett, 99.  
98 S.P. 162.  
Douglas:  
*U.S. Geo-  
logical  
Survey,  
Bulletin*,  
689, pp.  
33 sq.

Costa Rica-

Panama

Boundary

Award.

108 S.P. 404.

Westlake,

I. VII.

Bluntschli,

§§ 298 &amp; 301.

Douglas :

"c. p. 2.

*Rivers, Bays and Lakes.*

When a river, bay or lake separates the territories of two States, the boundary between them is presumed to lie along the middle line, or, in the case of navigable rivers and bays, to follow the *thalweg* or course of the strongest current or main channel.

Where an island belonging to one of the riparian States extends or lies beyond the middle line or *thalweg* towards the opposite shore, the boundary line should, it would seem, be deflected so as to pass between the island and that shore. In the Anglo-American Treaty of April 1908, regarding the boundary between the United States and Canada, it was provided that, in such a case, the line should pass 'on the other side of any such island, following the middle of the channel nearest thereto.' The Franco-German Convention of the 18th April, 1908, defining the boundary between the French Congo and the Cameroons, provided that the line should pass midway between any such islands and the opposite shore.

101 S.P.  
214 & 1009*Some doubtful rules connected with Rivers.*

Occupation of one bank.

Vattel I.

§ 206.

G. F. de

Martens,

I. § 39.

Hall II.

II. § 38.

3 Robin-

son's *Reps.*

at 339.

It is sometimes stated that, when one bank of a river or lake has been occupied before the other, the nation that effected the earlier occupation thereby acquired a right to the whole width of the stream or lake. This, so far as rivers are concerned, appears to have been the opinion of Sir W. Scott (afterwards Lord Stowell) as expressed in his judgment in the case of *The Twee Gebroeders* (1801) in which, after referring to the general presumption of the common use by conterminous States of the rivers flowing through their territories, he remarked that this common use might be excluded. The judgment continues as follows :—

The banks on one side may have been first settled, by which the possession and property may have been acquired. . . . But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established, on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence. The usual manner of establishing such a claim is, either by the express recorded acknowledgment of the conterminous States, or by an ancient exercise of executive jurisdiction, founded presumptively on an admission of prior settlement.

II. III.  
XVIII.

Grotius' view, however, seems to have been that the occupant of the first bank should have taken possession of the

whole of the river before the second bank was occupied if he is to be in a position to claim the whole width. Similarly, the right which Twiss allows to the earlier occupant in similar circumstances is to 'reduce the channel of the river into possession without occupying the other bank.'

On the whole, it seems probable that modern International Law, which lays such stress upon the doctrine of effective occupation, would not allow a right to the whole river or lake to be based merely upon a presumption of law from the occupation of one of the banks; and that, if actual possession of the whole width has not been taken before the land on the opposite side is occupied by another State, the boundary should be the middle line (or the *thalweg*) of the river or lake.

Hall and Taylor consider that the acquisition of the whole of the stream or lake carries with it a right to the opposite bank, and perhaps to a margin beyond. But here again it would seem to be more consistent with the principles underlying the modern rules for determining the goodness of a title based upon occupation to say that a valid claim to the opposite bank ought to be based upon an actual taking possession thereof.

Hall II.  
II. § 38.  
Taylor,  
§ 261.

Occupation of the whole width of a river or lake.

#### *A Coastal Strip and the Watershed.*

In the controversy between the United States and Spain, in 1805, with reference to the western boundary of Louisiana, the United States Commissioners advanced certain principles which, they urged, were applicable to the case, and had been adopted in practice by European Powers in the discoveries and acquisitions which they had made in the New World.

5 S.P.  
327 *sq.*  
I. Moore's  
*Digest*,  
263.  
Twiss:  
§ 117.  
Twiss,  
*Oregon*,  
244 *sq.*

The first of these principles was:—

That when any European Nation takes possession of any extent of Sea Coast, that possession is understood as extending into the interior Country, to the sources of the Rivers emptying within that Coast, to all their branches, and the Country they cover, and to give it a right in exclusion of all other Nations to the same.

Westlake,  
I. V. (114).

'Nature,' they urged, 'seems to have destined a range of Territory so described for the same society; to have connected its several parts together by the ties of a common interest, and to have detached them from others.'

The facts to which the United States sought to apply this rule were, broadly, the following.

Louisiana-Texas  
Boundary.  
5 S.P.  
326 *sq.*

The United States were claiming as the successors in title of France, by which country Louisiana had been ceded to them

Hall II.  
II. § 33.  
Twiss:  
*Oregon*,  
217 *sq.*  
Douglas:  
*U.S. Geo-  
logical  
Survey  
Bulletin*  
689, pp.  
22 *sq.*

in 1808. They alleged that the Mississippi had been explored by Frenchmen from Canada as low down as the Arkansas in 1678, and to its mouth in 1680; that in 1682 De la Salle and Tonti descended the river with sixty men to the ocean, took possession of the country and named it Louisiana; and that, in 1685, De la Salle, with 240 persons from France, formed a settlement in the Bay of St. Bernard on the western side of the River Colorado. These acts, it was declared, were done in the name and under the authority of France, and proclaimed her sovereignty over the whole country to other Powers.

'It was,' the United States further alleged, 'on the authority of the discovery thus made, and of the possession so taken, that Louis the XIVth granted to Anthony Crozat, by Letters Patent, bearing date in 1712, the exclusive commerce of that Country; in which he defines its Boundary, by declaring that it comprehended all the Lands, Coasts, and Islands which are situated in the Gulf of Mexico, between Carolina on the East, and Old and New Mexico on the West, with all the Streams which empty into the Ocean within those Limits and the interior Country dependent on the same.'

The right of France, the United States contended, had accrued by the discovery and possession of the Mississippi in its whole length and the coast adjoining it before the grant to Crozat in 1712. The religious missions established by Spain in Texas from 1690 onwards, and the Spanish explorations in that Province, occurred, they maintained, posterior to the completion of the French title on which the United States relied.

Spain objected to the claim of the United States to extend the boundaries of Louisiana so as to include Texas, on the grounds that Spanish navigators had discovered the coast before the arrival of the French, and that the French post to the west of the Colorado River persisted only a few years, while the district had subsequently been taken possession of and permanently held by Spain.

As we shall see when we come to discuss the doctrine of 'Middle distance,' the extreme claim of the United States was based partly upon that doctrine. The boundary was subsequently settled by mutual agreement.

Twiss considered that, in claiming that an occupation of the sea coast carries with it the possession of the inland territory and of the navigable rivers included within it, the United States were enunciating a proposition of law to which all European nations would agree. The rule was also given by Field in his

The water-  
shed rule  
has a  
limited ap-  
plication.  
§ 75.

International Code. But whatever validity the rule may once have had, it would not now be accepted in its broad form.

It is, however, generally accepted that when a nation settles along the sea coast, its rights are not limited to the strip of land which it actually occupies. It has a contingent title to a reasonable amount of the inland territory, to an area which, according to Bluntschli, forms 'un ensemble naturel' with the coastal strip; and cases no doubt occur in which such a natural unit is bounded by the watershed of the rivers which form the approach to the inland country and pass through the coastal strip. But, as Hall and Maino point out in this connection, the extent of coast occupied should 'bear some reasonable proportion to the territory which is claimed in virtue of its possession.'

The point that the natural unit, of which a coastal strip forms part, need not extend back as far as the watershed, was urged by Venezuela in the British Guiana Boundary Arbitration. Both Venezuela and Great Britain agreed to the proposition that 'if a natural barrier exist between the coast region and the interior, that barrier will be the boundary between the two.' Great Britain submitted that, as she was rightfully in possession of the whole coast from the Corentin to the right bank of the Amakuru, she was, 'in the absence of actual occupation by any other Power . . . thus entitled to the whole hinterland of this range of coast, extending to the watershed constituted by the Pacaraima range, of which Mount Roraima, where the Cuyuni rises, forms part, and further east by the Akarai range, in which the Essequibo has its source.'

Venezuela, however, contended that there was an 'encircling rim, through which the rivers break only in cataracts,' which constituted 'a natural barrier' between the coast and the watershed; and that the unit of which the coast formed a part did not extend beyond this rim because the whole region back to the watershed did not 'have the occupied seaboard for its natural outlet to other nations.'

Bonilla, § 553.  
F. de Martens, I. § 89.

Phillimore  
I.CCXXXV.

§ 282.

*Int. Law*,  
II. II.  
§ 32.

*Int. Law*,  
Lect. IV.  
(71).

British  
Guiana-  
Venezuela  
Boundary.

C.-9337  
(1899),  
138.

C.-9336  
(1899),  
163.

C.-9501  
(1899),  
749 sq.

### *A River and its basin.*

The rule of coastal strip and watershed that we have just considered is more reasonable than the one which the United States subsequently put forward in the Oregon controversy. They asserted 'that a nation discovering a country, by entering the mouth of its principal river at the sea coast, must necessarily

The mouth  
of a river  
and the  
river basin.  
Twiss:  
*Oregon*, 148.

*Twiss,*  
§ 119.

be allowed to claim and hold as great an extent of the interior country as was described by the course of such principal river, and its tributary streams.' This proposition, Great Britain maintained, had never been recognized among the nations of Europe.

C.-9337  
(1899),  
136.

*The  
course of  
a river and  
the river  
basin.*

This rule was also discussed in connection with the Venezuela Boundary Arbitration. 'Ownership of the mouth of a river,' it was urged on behalf of Venezuela, 'does not, of itself, give title to the watershed.' 'This proposition is too narrowly stated,' replied Great Britain, 'ownership and control of the course of navigation of a river may in some instances give title to the watershed.'

C.-9336  
(1899),  
161.

Great Britain, in accordance with this view, claimed that, as the Dutch and the British had for centuries been in full possession of a very considerable territory on both sides of the Essequibo, 'according to every principle of international law, this carries with it the right to the whole basin of the Essequibo and its tributaries, except in so far as any portion of that basin may have been occupied by another Power.'

*These  
rules, too,  
are not  
usually  
applicable  
as rules  
of law.  
See Hall  
II. II.  
(§ 32).*

The only case in which it would seem to be at all reasonable to apply such rules as these is where the river forms the only means of approach to the interior country drained by it and its branches; and Great Britain put forward a more cogent argument when she alleged that 'the title of the British to the basin of the Essequibo and its tributaries is greatly strengthened by the fact that the only permanent means of access to by far the greater part of the upper portion of this basin is by these streams themselves.'

### *The course of a river and its delta.*

C.-9501  
(1899),  
793.

Venezuela suggested that there is a rule of law 'that gives to the nation owning the banks of a stream, and as appurtenant to that ownership, the delta region found at its mouth.' This, she declared, was a specific application of the rule of security, because possession of the delta regions is necessary to the control of the mouth of the river and to the security of the settlements along it.

Whatever the Arbitrators may have thought of the rule as put forward by Venezuela, they did not agree with her that it gave her the Waini, as well as the Barima, as 'parts of the delta water system of the Orinoco.'

*Middle distance.*

The second of the principles advanced by the United States in their controversy with Spain with regard to the western boundary of Louisiana was :—

That whenever one European Nation makes a discovery and takes possession of any portion of that Continent, and another afterwards does the same at some distance from it, where the Boundary between them is not determined by the principle above mentioned [that of coastal strip and watershed] the middle distance becomes such of course.

5 S.P. 328.  
Phillimore, I.,  
CCXXXVIII.

In virtue of this principle, the United States claimed that the boundary between Louisiana and Texas should run along the Rio Grande, as being half way between the settlements which, as we have already seen, had been formed by De la Salle in 1685 on the western side of the River Colorado and the then nearest Spanish settlement in the Province of Panuco.

Louisiana-  
Texas  
Boundary.

Spain accepted the principle of middle distance, although she disagreed with the contention of the United States as to the positions between which, in the particular circumstances, it should be reckoned. In view of the temporary character of the French settlement west of the Colorado, she urged that the line should be drawn half way between the settlements which had been subsequently formed and held permanently by France and Spain respectively. In the end, the boundary was fixed in the main in accordance with the Spanish contentions, as part of a general bargain between the two Powers.

The rule of middle distance has the merit of being simple and comparatively easy to apply in practice. It might, however, work unjustly where the land on one side of the line was much more valuable or important than that on the other. It has acquired considerable support from jurists, but it is usually put forward merely as the principle to apply when no other determining factors are present. In such circumstances, however, there appears to be no reason why the territorial rights of a State should extend beyond the area of which it is in actual possession, and in the absence of any topographical features which mark out portions of the vacant territory as naturally belonging to one or the other of the adjoining districts, it would appear that the only principle that should be appealed to is that of effective occupation, or provisional annexation.

The rule of  
middle dis-  
tance is not  
of legal im-  
portance.

See  
C.-9501  
(1890),  
757.

See Vattel,  
II. § 95.

Thus, in the Venezuela Boundary Arbitration, Great Britain denied that the line of division between neighbouring and rival

C.-9336  
(1890),  
149.

settlements could be ascertained 'by any hard and fast rule applicable to all cases.' The chief consideration was, she maintained, that of natural division.

*See a.g.,*  
F.O. Hand-  
book, No.  
93 (Gold  
Coast),  
p. 17.  
Wilson :  
*The*  
*Hague*  
*Arbitration*  
*Cases*, 374.

### *Racial and Tribal Divisions.*

Racial and tribal divisions have not in the past been given the consideration they deserve in connection with the determination of the boundaries of backward territory. For example, the Arbitrator in the Timor boundary dispute (1914) found that Portugal and Holland had divided the territory of the Ambenos in such a way that pasture and garden lands belonging to the natives in Portuguese Timor fell in Dutch Timor.

Curzon :  
*Frontiers*,  
pp. 36 & 7 ;  
F.O. Hand-  
book, Nos.  
68 (Mon-  
golia) and  
86 (Timor).

Tangan-  
yika-  
Ruanda  
boundary.  
Cmd. 1974  
and 2017

*The Times*,  
3 & 6 Sept.,  
1923, & 31  
Jan., 1924.

*Monthly*  
*Summary*  
*of L. of N.*  
*III.*, p. 203.  
*J. of Soc. of*  
*Arts*, 72,  
p. 717.

British and  
French  
Cameroons  
Cmd. 2017  
& 8 (1924).

Nigeria  
and French  
Soudan.  
97 S.P. 86.  
*See also*  
112 S.P. 723.

French  
West

Until comparatively recently, the principle has found its chief application in Asia ; but it is now being taken more frequently into account in fixing international boundaries in Africa.

The transfer in 1923 of a portion of the Ruanda country from the British to the Belgian mandated areas in East Africa was a direct tribute to this principle. The boundary laid down in 1919 had passed through the territories of the Sultan of Ruanda and divided them between the two Mandates. This division was strongly objected to by the Ruanda people ; it had a 'disastrous effect on the tribal organization and the welfare of the natives,' and it rendered the administration of the territories difficult.

The Permanent Mandates Commission of the League of Nations drew the attention of the Council of the League to the position ; and Great Britain, on the Council's invitation, agreed to make the transfer which the reunion of the Ruanda country required.

On similar grounds, the Council of the League have recently suggested a readjustment of the frontier between the French and British mandated areas in the Cameroons.

Among other instances of the recognition of this principle in Africa, the following may be noticed :—

(1) The Anglo-French Treaty of the 8th April, 1904, provided that, in determining certain portions of the frontier line between Nigeria and the French Soudan, regard should be had 'to the present political divisions of the territories' so as to leave certain tribes to France and others to Great Britain.

(2) The Franco-Liberian Agreement of September 1907, provided that the dividing line between French West Africa

and Liberia in certain sections 'devra éviter de séparer les villages d'une même tribu, sous-tribu ou groupement.'

(8) The frontier between Italian Somaliland and Abyssinia was drawn in the Italo-Ethiopian Convention of the 16th May, 1908, in such a way as to follow the territorial boundaries between various tribes; and the two Governments undertook 'not to allow the tribes dependent on them to cross the frontier in order to commit acts of violence to the detriment of the tribes on the other side of the line.'

Africa and  
Liberia  
100 S.P. 915.  
Italian  
Somaliland  
and  
Abyssinia.  
101 S.P.  
1000.

### *Summary.*

On the whole, then, we may say that the territory acquired by an act of occupation is usually limited to the area within which the occupation is effective, or which has been mentioned in the proclamation of annexation.

Where, however, the adjoining territory forms a physical unit with the region effectively occupied, the occupying Power may have rights over that adjoining territory, but such rights are contingent upon its taking effective possession of the whole of the unit within a reasonable time.

Such contingent rights would extend, for instance, over the whole of a moderately sized island; and might reasonably in some cases cover the region between a coastal settlement and the water-divide along an adjacent range of mountains, or between a settlement and the middle line or *thalweg* of a neighbouring river or lake. The occupation of one bank of a river or lake would also carry contingent rights over the whole width of the river or lake so long as the opposite bank remained unoccupied. But the area over which such contingent rights are claimed must bear a reasonable relation to that of the part actually occupied. Thus the whole of a river basin could not be considered to be necessarily appendant to a settlement at the mouth of the river or along part of its length.

In determining the details of international boundary lines, due weight is usually given in practice to the advantages of making them coincide with the physical features by which the district is naturally partitioned; and the importance of having regard to the tribal and racial divisions is also being increasingly recognized.

## CHAPTER XXVIII.

### AGENTS; AND THE ACT OF APPROPRIATION.

The acquisition of sovereignty involves *corpus* and *animus*.  
Salmond: *Jurisprudence*, § 98, *Dig.* 41, 2, 3 (1).

The *animus* must be that of the sovereign.

The *corpus* is effected by an agent.

See *King of Italy's Award*, 89 S.P. 930 & Cd. 2166 (1904).

THE acquisition of territorial sovereignty involves, as we have seen, an actual taking of possession; and this is made up of two elements:—first the *animus*, called variously the *animus possidendi*, the *animus domini*, or the *animus sibi habendi*, that is to say, the intention on the part of the sovereign to acquire and retain certain territory; and secondly what is usually called the *corpus*, or the physical act by which that intention is realized in fact. *Apiscimur possessionem corpore et animo, neque per se animo aut per se corpore*.

The *animus* or intention must be the mental act of the sovereign himself. In the case of a modern State it must be the determination of that branch of the State Government which is competent, under its constitution, to accept the responsibility of adding to the State territory.

The *corpus* or physical act of occupation or taking possession is in practice performed by an agent. It must be effected in the name of the State which intends to acquire the sovereignty.

Agents for this purpose may be classified according to the nature of the being who acts in that capacity, or according to the way in which the *animus* of the sovereign is added to the physical act of the agent. We will consider the matter under these two aspects in turn.

#### *The different kinds of Agents.*

An agent may be (1) an individual or a number of individuals, or (2) a corporation, or (3) a colony or subordinate part of the State itself.

(1) Individuals.

Payne, I. 235.

The individual need not be a subject of the sovereign on whose behalf he acts. Christopher Columbus was a Genoese; John Cabot a Venetian. Giovanni da Verrazzano, who was despatched by Francis I to take possession of the coast of North America for France, was a Florentine. Magalhaens who

discovered the Strait of Magellan while employed by the King of Spain was a Portuguese who had previously been employed by the King of Portugal. Stanley, who entered the service of the *Association Internationale du Congo*, was an American.

Payne, I.  
226.

See  
Ch. XII.  
above.

(2) Corporations.

The Corporations which have been utilized in this connection are chiefly the great chartered companies to which we have devoted a good deal of attention in Chapter XII. We have there shown, dealing with companies of the earlier period of colonization, the seventeenth and eighteenth centuries, as well as with those of the later period dating from the last quarter of the nineteenth century, that, in all cases, when engaged in acquiring territorial sovereignty, the Company was acting as the agent of the State by which it was created.

When the act of taking possession is performed through the medium of a colony or subordinate part of a State, although the colony or part of the State may, in its turn, appoint its own agents to perform the physical act, it follows from what has been said in Chapter XIII that the *animus* must, in the final analysis, be that of the international person on whose behalf the sovereignty is being acquired, that is to say, it must be the decision of the competent authority in the mother country or the State as a whole.

(3) Colonies or subordinate parts of the acquiring State.

### *Authorization and Ratification of the Agent's act.*

We will turn now to a consideration of the ways in which the physical act of the agent can be converted into a full assumption of sovereignty by means of the *animus* of the sovereign. We shall first deal with the simplest case, namely, that in which the agent acts under a previously given authority to take possession of a definite tract of country. In the second place we shall discuss the position when no previous authorization has been given to the agent to acquire territory. Lastly, we shall consider some intermediate cases, namely, where an authorization to acquire territory has been previously given but it has not definitely specified the territory to be annexed.

As an example of an authorization given in advance to annex a definite portion of territory, we may instance the instructions which were sent by the British Government in 1884 to the Commodore on the Australian station to proclaim the Queen's protectorate in New Guinea 'from East Cape to the Gulf of Huon,' and 'over the Louisiade and Woodlark groups of islands.' In such a case as this, the *animus* of the sovereign having been directed to a definite area, the assumption of

Previous  
authorization.  
76 S.P. 781.

sovereignty is complete as soon as the agent has actually carried out the annexation.†

#### Ratification.

*Dig.* 41,  
l. 9 (5).  
*Jusl. Inst.*,  
II. I. 44.  
Savigny:  
*Possession*  
II. XXVIII.

In Roman Law, for the purpose of a transfer of property, it was immaterial in which order the two elements in possession, *animus* and *corpus*, came into existence so long as they did co-exist. Moreover, possession might be taken by a *negotiorum gestor*—i.e. by a person acting for another without his authority—provided the act was afterwards ratified by the principal. Similarly, if an unauthorized annexation of eligible territory has been made in the name of a State, that State can, by a subsequent ratification, add its *animus* to the acts done in its name, and its assumption of sovereignty will then be complete, and will date from the day of the annexation, in virtue of the maxim: *Omnis ratihabito retrotrahitur et mandato priori æquiparatur*.

Bluntschli,  
§ 279.  
Heffter,  
§ 70.  
Field, § 71.

Vattel.  
II. § 74.

Vattel supports this principle in International Law in another connection when he says that 'if a nation or its chief approves and ratifies the act of the individual, it then becomes a public concern.'

Elizabeth  
and  
Drake.  
*Oregon*,  
377 sq.

As an illustration of the doctrine, Twiss refers to Drake's voyage of discovery to the Pacific. Drake, he says, probably had no written commission when he set out, but his acts were approved and ratified by Queen Elizabeth after his return.

Charles V  
and Cortés.  
Prescott:  
*Mexico*,  
VII. I.

Another classical instance is that of the ratification, by Charles V of Spain, of the conquest of Mexico. The powers which Cortés possessed extended only to trafficking with the natives, not to the establishment of a colony. But having assumed the latter power, he solicited the Emperor's confirmation of his acts, and this was granted in 1522.

Private  
individuals  
and State  
officials.

In this connection it is sometimes sought to draw a distinction according as the person who has performed the physical act of taking possession has been an officer or official of the State or merely a private individual.

The  
Oregon  
contro-  
versy.  
See Ch.  
XVIII.  
above.  
Twiss:  
*Oregon* 292  
& 327.

Thus the United States, in their controversy with Great Britain, based their claim to the Oregon territory in part upon the discovery and exploration of Captain Gray, a citizen of the United States, who, while upon a private trading expedition, sailed for some twenty miles up the Columbia River.

The United States Commissioners would not admit that, for the purpose of acquiring a title to territory in virtue of discovery, there was any distinction between a trading ship and a government vessel. 'A merchant vessel,' they urged, 'bears the flag of her country at her mast-head, and continues under its juris-

diction and protection, in the same manner as though she had been commissioned for the express purpose of making discoveries.'

Great Britain maintained that, as the expedition of Captain Gray was of a purely mercantile character, it could not result in any territorial gain to the United States. Twiss: *op. cit.*, 148 & 230-1.

Twiss considers that the view put forward by Great Britain was the correct one. The contention of the United States that the ship of Captain Gray, whether fitted out by the Government or not, was a national ship for the purposes of the occasion, is not, he says, 'in accordance either with the practice of nations, or the principles of natural law.' He supports his position by referring to the statement of Vattel that the practice of nations has usually respected the discovery and taking possession of a desert country when effected by navigators 'furnished with a commission from their sovereign.' Id. 276-8.  
I. § 207.

Now, while the view that the voyage of Captain Gray could not form the basis of a title to territorial sovereignty was, under the circumstances, no doubt the correct one, this would appear—apart from the considerations that we have already dealt with in Chapter XVIII—to have been due to the fact that the United States had not subsequently adopted the act for that purpose, and not to any difference between a private and a government ship. See Westlake in 23 *R.D.I.* at 263.

Twiss says that the acts of a person bearing the commission of his sovereign are respected as public acts. When, he points out, Mr. Astor mentioned that he was prepared to renew the attempt to re-establish the settlement of Astoria on the Columbia River provided he 'had the protection of the American flag,' it was recognized by the United States authorities that 'a lieutenant's command' would be sufficient for this purpose. Oregon, 333

But even where an unauthorized taking of possession has been performed by a commissioned officer of the State, that act does not bind his State unless it is subsequently ratified. Holtzendorff, for instance, says that discoveries made by an expedition organized by a State with the avowed object of making scientific researches do not give rise to a title to sovereignty because the motive with which the expedition has been promoted excludes the presumption of the *animus rem sibi habendi*. And instances are not wanting in which acts of territorial acquisition on the part of an officer have been repudiated by his Government. Unauthorized acts of a commissioned officer require ratification.  
Quoted by Westlake, 23 *R.D.I.* 268.

Hight &  
Bamford,  
Obs. II, III.  
I. Moore's  
Digest  
537 sq.  
70 S.P. 220.  
86 S.P.  
1209 sq.

F.O. Hand-  
book, No.  
148, p. 16.

1919 A. C.  
at p. 235.

Acts  
required  
of private  
and com-  
missioned  
unauthor-  
ized appro-  
priators.  
Hall;  
*Int. Law*,  
II. II. § 32.  
Maine;  
*Int. Law*,  
*Leak. III.*  
(68).

For example, the annexation of New Zealand by Cook in 1769-70 was disowned by the British Government. On four occasions between 1873 and 1885 a special agent or consular officer of the United States declared the Samoan Islands to be under the protection of the United States, and in 1876 the agent had actually set up a government in the Islands and was administering it; but on each occasion the action was disavowed by the United States Government as being unauthorized. The annexation of New Britain by the commander of a German war-ship in 1878 was repudiated by the German Government. Moreover, as we have seen in the case of the annexation made in New Guinea by the Queensland Government, even when such an act has been performed by a colonial Government, it is liable to be set aside by the Government of the mother country.

'Those public acts,' said the Judicial Committee of the Privy Council in their Report in the Southern Rhodesian lands case, 'by which one independent sovereign, however humble, enters into political relations with the agents of another . . . have been common enough in the history of the British Empire. They derive their juridical character from their recognition and adoption by the Crown.'

Hall and Maine draw a distinction between what is necessary to be done by an appropriator who bears a commission of his sovereign and an appropriator who has not been commissioned. In the case of a commissioned officer, they consider that a merely formal assumption of possession can be ratified by his State; whereas an uncommissioned appropriator must form an actual settlement if it is to be possible for the title of his State to be perfected subsequently by ratification.

It would appear, however, that even such a distinction as this is untenable. On the one hand, it is difficult to see how the mere fact that the individual making the annexation bears a commission can relieve him or his Government from any act that is necessary to complete the physical element in possession. On the other hand, all that is required for the temporary physical taking of possession pending ratification is some act or proclamation which announces to the world, or at all events to any would-be subsequent appropriator, that possession has already been taken of the area in question on behalf of a particular State. Such an act can be performed by a private person equally well as by a commissioned officer, and so long as it is efficiently done it should, for a reasonable time, be open to the

State to ratify the act whether the individual who performed it possessed a commission or not.

In support of this view, the following opinions, in which no distinction is made between the act to be performed by a commissioned and an uncommissioned appropriator respectively, may be quoted.

Phillimore says that, in order that a discovery may furnish an inchoate title, the discoverer must either in the first instance be fortified by the public authority and by a commission from the State of which he is a member, or his discovery must be subsequently adopted by that State.

Phillimore.  
I.  
§ COXXVII.

Westlake's rule is that, in order that territorial rights may flow from the discoveries of private individuals, they must be distinctly and publicly adopted by their Government.

Westlake.  
23 R.D.I.  
253.

Oppenheim considers that the act of occupation must either be performed in the service of a State or be acknowledged by a State after its performance.

Oppenheim.  
I. § 220.

'Au point de vue subjectif,' says F. de Martens, 'il est nécessaire que l'occupation ait lieu au nom et avec l'assentiment d'un gouvernement. Si elle est effectuée par des fonctionnaires, représentant un État, il n'y a aucun doute quant à la nation qui doit être considérée comme propriétaire de la terre occupée. L'occupation entreprise par des particuliers doit être sanctionnée par le gouvernement au profit duquel elle a été accomplie.'

F. de Martens.  
I. § 89.

In some cases, while a definite authorization to acquire territory has been given, no specific territory has been mentioned in the authorization. The earlier commissions granted to navigators and adventurers in the fifteenth and sixteenth centuries, for example, were frequently unlimited with regard to the area within which they were to be exercised.

Authorizations which do not mention specific territory.

Thus the first commission of Ferdinand and Isabella to Columbus in 1492 referred to 'Islands and Continent in the ocean,' some of which it was hoped he would discover and conquer.

Hazard, 1.

The Letters Patent granted by Henry VII to John Cabot and his three sons in 1495 authorized them to discover and take possession in the King's name of any islands, countries, regions or provinces of any heathens and infidels in any part of the world which had previously been unknown to Christians; and in another Patent of the same monarch dated 1501, the grantees are authorized to sail east, west, north, and south and discover and take possession of lands of Gentiles and Infidels.

Hazard, 9.

Payne, I.  
215.

Annexations made under these require ratification.  
*Dig.* 41, 2,  
 3 (2).

Cases such as those would not appear to be different, from the point of view of International Law, from those in which no previous authorization has been given. The *animus* to be effective must be directed to a definite area. *Incertam partem rei possidere nemo potest*, said the Roman jurist, and as an example he added that it was not sufficient merely to have the intention to possess whatever was possessed by another. Thus the *animus* of the sovereign is not, it would seem, effectively exercised in respect of any particular portion of territory by authorizing an agent to annex territory wherever possible, and until each particular annexation has been ratified, the assumption of sovereignty is not complete.

English Law.  
*Adv.-Genl. of Bengal v. Rames Surnomoye Dossie.*  
 2 Moore's P. O. Cases N.S. at 59.

The rule of English Law is that 'where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State.' Such a rule might not unreasonably be compared to the wide authorizations we have just been considering, but it is never suggested that, because the rule exists, no ratification is necessary of the act of an Englishman who takes possession of unoccupied territory on behalf of his Government.

Authorizations which do not describe the boundaries of the territory.  
*Cd.* 5857.  
 (1911).  
 104 S.R. 50.

Some authorizations, while they refer to particular territory, do not definitely specify the limits of the area to be acquired.

For example, in 1878 the British Colonial Secretary told the Governor of the Colony of the Cape of Good Hope that 'the British flag should be hoisted in Walvisch Bay, but that, at least for the present, no jurisdiction was to be exercised beyond the shores of the bay itself.' Thereupon the Governor informed the Colonial Secretary of the Colony that 'the naval officer should, on the hoisting of the flag, proclaim sovereignty only over the station and the bay itself and a radius of 10 or 12 miles or so, according as it might appear necessary after consultation with Palgrave.'

These annexations should be ratified.

In such a case it would appear that a ratification of the act of the agent with respect to the area finally annexed is necessary in order that the *animus* of the sovereign may be directed to the whole of it. In the case of the annexation to which we have just referred, this was done by the Queen's Letters Patent ratifying and confirming the proclamation of the officer who had carried out the annexation.

Acquisitions made by chartered Companies

The charters which were granted to such Companies as the British East Africa Company and the British South Africa Company usually contained a wide authority to acquire territory. The British East Africa Company, for example, was

empowered to acquire 'rights, interests, authorities, or powers of any kind or nature whatever in, over, or affecting other territories, lands, or property in Africa.' We have seen that the sovereignty over all acquisitions made by such a Company accrues to the State which granted it its charter; but since, as a rule, no definite portions of territory are referred to in the charter in connection with future acquisitions, the ratification of the State Government would, according to the principles we have just considered, be necessary to the completion of its title to the sovereignty. In the case of the British charters, this condition has usually been met by a provision that all future territorial acquisitions are to be subject to the approval of the Secretary of State.

require  
ratification  
by their  
State.

Ch. XII.

It may be noted that these charters also functioned as ratifications of acquisitions which had already been made by the Companies when they received their charters. For they specified the territories which the Companies had acquired, either by occupation or by agreement with the local chiefs; and the Government must, by granting the charters, be taken to have accepted the sovereignty over the territories mentioned in them.

### *Summary.*

An agent, then, for the purposes of territorial acquisition, may be a natural or an artificial person, and in the former case he may be a commissioned officer or a private individual.

If the agent has received a previous authorization to take possession of a specified area, the assumption of sovereignty on the part of the authorizing State is complete when the agent has properly carried out the annexation on the spot.

If the agent acts without an authorization to acquire territory, or without an authorization to acquire the specific territory annexed, all that is necessary, whether the agent is a commissioned officer or official of his State or not, is that he shall have taken possession in the name of the State on behalf of which he acts in such a way as to make clear to a subsequent would-be appropriator that this has been done, and the assumption of sovereignty can then, within a reasonable time, be consummated by the ratification of the agent's act by his State.

## CHAPTER XXIX.

### NOTIFICATION; AND THE ASSENT OF OTHER STATES.

Ch. XIX.  
above.

WE saw when discussing the Declaration with reference to 'new Occupations on the Coasts of the African Continent' in the General Act of the Berlin Conference that, by Article 84 of the Act, the notification of an acquisition was made, as between the signatory Powers, one of the essential conditions of the effectiveness of the acquisition. And this condition was to apply to the assumption of a protectorate as well as to a taking of possession. But the Article was limited in its geographical scope, and has, moreover, been repealed for such of the Powers as have ratified the relevant Convention of St. Germain-en-Laye of September 1919, so that it is important to enquire what is the legal position with regard to notification apart from the requirements of the Act.

A taking  
of possession  
must  
be open.  
See West-  
lake, 23  
R.D.I.  
235-6.  
Vattel;  
I. § 207.

That a taking of possession, in order that it may be valid by International Law, must be carried out openly and in some well understood and unequivocal manner has for long been recognized.

Thus Vattel laid down that a nation which has taken possession of an uninhabited and ownerless country cannot be deprived of it by another nation 'after it has sufficiently made known its will in this respect.'

5 Robin-  
son's Reps.  
at 115.

Again, Lord Stowell, in his judgment in *The Fama* (1804) said that 'even in newly discovered countries, where a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact.'

See e.g.,  
94 S.P.  
1303 & 4.

Notifica-  
tion means  
a direct  
communi-  
cation.

But the erection of a flag or notice on the territory and the reading of a proclamation there, or even the public announcement or ratification by the acquiring State of an acquisition made on its behalf—facts which would generally soon become known to other States—is not a notification in the sense in which we are considering it. For our present purpose, a notification means a definite formal pronouncement made directly to another Government by the acquiring State.

The utility of such a notification is not far to seek. It strengthens the position of a State which has properly taken possession of, or established its protection over, available territory, during the 'reasonable delay' within which it is perfecting the administration of the region. It marks the latest date which should be given to the title of the acquiring State as against the Powers notified. And it enables other States to put forward any claims they may have to make in respect of the territory at such a stage that the claims can be dealt with before the acquiring Power has taken any difficultly retraceable steps in regard to the region.

The value of notification.

In the case of the second of the 'essential conditions' of the Berlin Act, namely, that of effective occupation, we were able to show that, before the assembling of the Conference, the requirement had already met with considerable acceptance on the part of statesmen and jurists. The same cannot, however, be said with regard to notification.

Position before the Berlin Conference. See Ch. XIX. above.

Twiss, writing in 1861, said that :—

A State may indeed notify to other States any important additions to its territorial limits, which it may have acquired either by occupation or by cession, but such notifications are matters of courtesy for mutual convenience, and the announcement of the fact of any such acquisition is not obligatory upon the State which makes it.

§ 19.

It is true that he also said that for a discovery to serve as the foundation for an exclusive title to territory, it was necessary that it should be notified to other nations. But it does not appear that, in this connection, he had in mind a direct notification, but merely some act, of the kind we have already mentioned, manifesting to other nations the intention to appropriate the territory.

*Law of Nations* § 111; & *Oregon* 187 sq. & 289.

Prior to the Berlin Conference, however, several express notifications of acquisitions had been made. For example, between 1849 and 1880, nearly 400 treaties and conventions concluded by the Netherlands Government with native princes in the Eastern Seas were from time to time communicated by the Dutch to the British Government; and in August and September 1884, the German Government notified the British Government that the territory afterwards known as South-West Africa had been placed under the protection of the Emperor. France had also notified her protectorate over Tunis.

C.—3109 (1882), p. 44.

75 S.P. 538 & 548

Despagnet § 304.

While the Conference was sitting, the German Government notified to Great Britain that the German flag had been hoisted

Notifica-  
tions at  
the time of  
the Con-  
ference.  
76 S.P.  
780-1.

Hortelot:  
*Map of  
Africa, etc.*,  
II. 882.  
77 S.P.  
1108.

At the Con-  
ference  
C.-4361  
(1885), 214.  
Notifica-  
tion was  
recognized  
to have  
been  
previously  
optional.  
Ib. 215.

C.-4284  
(1885).

Notifica-  
tion apart  
from the  
Final Act  
since the  
Confer-  
ence.  
Despaguet  
§ 394.  
77 S.P. 940.

on the north coast of New Guinea and in certain of the adjacent islands; and the subsequent extension of the British protectorate in New Guinea was officially communicated to the German Government by the British Ambassador. Just after the conclusion of the Conference, the German Government informed the participating Powers of the treaties that German subjects had made in East Africa during the time the Conference had been sitting.

At the Conference, the utility of notification was generally accepted, and, as we have seen, the Powers represented agreed to make it an essential condition of the validity of an acquisition in the regions with which the Conference was concerned. But it was realized that, in this respect, they were not merely applying a rule which already formed part of International Law. 'Notification is not yet wholly sanctioned by practice,' ran the report of the Commission charged by the Conference with the examination of the draft of Articles 84 and 85; and the Commission considered that it would be 'a useful innovation in public law.' The British representative, in his anxiety after the Conference to prove that 'international duties on the African coasts remain such as they have been hitherto understood,' went so far as to say that the requirement of notification in the Final Act was 'rather an act of courtesy than a rule of law.'

Since the Conference, a few acquisitions made outside of the territories dealt with in the Final Act have been notified. For example, France notified her protectorate over Grand Comoro, Johanna, and Mohilla, stating at the same time that those Islands were not strictly within the regions dealt with by the Act.

In one or two cases, moreover, such a notification has been provided for by special international agreements. Thus by the agreement of the 7th March, 1885, between Great Britain and Germany on the one hand and Spain on the other with reference to the Sulu Archipelago, Spain agreed to communicate in each case the effective occupation of a point in the Archipelago to the Governments of Great Britain and Germany, and at the same time to inform commerce by a notification in the official journals of Madrid and Manilla. It was further provided that no imposts should be levied or regulations enforced by Spain in any point so occupied until six months after the publication in Madrid. Similar provisions found a place in the arrangement made between Germany and Spain in December of the

same year with regard to the Caroline and Palao Islands, following the mediatorial recommendations of the Pope to which we have referred in Chapter XIX. Again, in the Anglo-German Agreement of the 1st July, 1890, the contracting Powers promised to notify to one another all treaties that might be made in territories intervening between the Benue and Lake Chad.

82 S.P. 42.

These isolated special agreements, when taken in conjunction with the fact that, apart from the region dealt with in Article 84, notifications have been the exception rather than the rule, serve to emphasize the point that such notifications were not required by the general law. In respect of the territories covered by the Declaration in the Berlin Act, notification stood on a level with effective administration as an essential element in the establishment of a good title. In the Declaration adopted by the *Institut de Droit International* in 1888, notification was made similarly vital in all cases. But the practice of States does not appear to warrant the attachment of such an importance to notification at present.

Notification not legally necessary ;

X. Ann., 201.  
See Oppenheim § 224.

Although, however, notification is not strictly necessary, it is, as we have seen, valuable as a protection to an acquiring State. In his arbitral Award in 1902 in the matter of the 'Sergeant Malamine,' Baron Lambermont gave weight to the fact that the British protectorate over the banks of the Benue had been notified, although, as he noted, these territories are not on the African coast and therefore did not fall within Article 84.

but advisable.  
See Bonfil § 555.  
Despagnet § 304.  
Westlake :  
Collected Papers, 165.

85 S.P. 141.

#### *Conditions with which a Notification should comply.*

From a consideration of the wording of Article 84 and the circumstances connected with its adoption at the Conference, it is possible to determine some of the conditions with which a notification should comply if it is to be effective.

#### *(i) It should be given as soon as possible.*

First, as to when the notification should be given, the terms of Article 84 are that the Power taking possession or assuming a protectorate 'shall accompany the respective act with a notification thereof.' It would thus appear that the intention of the Conference was that the notification should be given as soon as, but not before, possession has been formally taken or a treaty for a protectorate has been concluded.

Bonfil § 555.

An examination of different cases shows that notification

C.-5432  
(1886).  
78 S.P. 538.  
Hortaleit:  
*Map of  
Africa, &c.,*  
II., 682.  
II., 745-7.

has not usually been delayed for long after the actual acquisition. Great Britain has allowed the following periods to elapse between the date of taking possession or of establishing a protectorate and the date of notification; six days, eight weeks, ten weeks, twenty-four weeks, eighteen months. A German notification was given, in one case nine days, and in another seven days, after the sovereignty had been assumed by the Government. Corresponding periods in French cases have been twelve weeks after the ratification of treaties which had been made, in some cases, nearly a year previously, and sixteen weeks after the ratification of treaties made within the preceding five months. An Italian notification was given, on one occasion four days, and on another three weeks, after the assumption of the protectorate. Spain in one instance allowed some two months to pass between the signature of the treaties and their notification.

III., 1126 &  
1123.

III., 1184.

In view of the wording of the Article, and the simple nature of the requirement, one or two of these delays would seem to have been unduly long. But no exception appears to have been taken by the notified Powers on that account.

(ii) *It should be made directly to the State to be affected with it.*

X. Ann.,  
202.

See e.g.  
78 S.P. 759.

By the Article, the notification was to be 'addressed to the other Signatory Powers.' In the Declaration of the *Institut de Droit International* it was provided that the notification might be made by publication in the form usually adopted in each State for the notification of official acts, as well as by diplomatic means. But it would seem that an intimation should always be sent or given directly to the Power which it is desired to affect with the notice.

(iii) *It should describe the boundaries of the territory.*

C.-4361  
(1885), 218.

The draft of the Article as presented to the examining Commission by its sub-committee included the following paragraph:

C.-4361  
(1885), 214.

The act of notification shall contain an approximate settlement of the limits of territory occupied by such Power or placed under its Protectorate.

The British Ambassador expressed himself in favour of retaining this provision in the Article. But other members of the Commission did not consider it necessary, regarding it rather as a question of form than of principle. It was, however,

recognized that such particulars were necessary. 'To notify the occupation or the taking possession of a territory,' ran the Report of the Commission, 'implies necessarily a definition, more or less precise, of the situation of that territory.' Moreover, it remained understood 'that the notification was inseparable from a certain determination of limits, and that the Powers interested could always demand such supplementary information as might appear to them indispensable for the protection of their rights and interests.'

In the days when it was customary for a Power to take possession of part of a large area of unappropriated territory with the intention of extending its sovereignty over as much of it as possible, such a Power would, no doubt, have been neither able nor willing to specify limits to its acquisition. Thus after Russia had, by Ukase in 1881, announced the annexation of the territory of the Téké Turkomans, the Russian Minister informed the British Government, in reply to an enquiry as to the boundaries of the territory in question, that he did not know what the boundaries were; and during the next two or three years Russia continued to extend her dominion in that region.

72 S.P.  
1078-8.

Skrine,  
Ch. VII.

But vast stretches of available territory, within which a Power can gradually extend the area under its sway to an indefinite extent, no longer exist. Future advances will, it would seem, be made chiefly by the setting up of protectorates over territory already in the possession of States in a more or less advanced stage of development; and in all future cases the notification of limits should be possible. As a matter of fact, such particulars have generally had a place in the notifications that have been made in the past. An 'approximate determination of the limits' was made a necessary feature of the notification in the Declaration of the Institute.

Such information would appear to be one of the most valuable features of the notification. International disputes with reference to newly acquired territory frequently turn upon the position of boundaries; and an announcement, at an early stage in an acquisition, of the extent of territory which the State concerned considers its action to have covered would prevent misunderstandings, minimize the possibility of disputes under this head in the future, and bring to light adverse claims at a time when they could be disposed of more readily than after one or other of the claimants had taken action in the disputed territory. A notification could not be regarded as effective in respect of territory not clearly covered by its terms.

Bonfile  
§ 556.

*Claims by notified States.*

The reason assigned for the notification in Article 94 was that the notification was to be given in order to enable other Powers 'if need be, to make good any claims of their own.' Before this phraseology was finally adopted by the Conference, one or two other wordings had been proposed, and several pertinent points discussed.

C.-4361  
(1886), 215.

The Italian Ambassador raised the question whether a notified Power could take any objections to the occupation or protectorate other than those which it could base upon acquired rights. The general opinion was that it could. Some of the delegates, for example, suggested that objections might rest upon mere commercial intercourse with the territory.

But no objections that were not based upon actual rights could, it would seem, affect the title of the acquiring Power from the legal point of view. To take the example referred to, a State whose subjects had established commercial relations with the territory might, no doubt, reasonably ask for a promise from the acquiring Power that no regulations would be enforced or imposts levied of a nature calculated to injure those relations; but the acquiring Power would be legally free either to grant or to refuse such a request. Thus, when Great Britain, in recognizing Germany's acquisition of South-west Africa in 1884, asked for an undertaking that no penal settlement would be established there, Bismarck replied that, while Germany had no intention of setting up such a settlement, he would give no promise on the subject, as he disputed the British right to require it; and the British Government thereupon acquiesced in this position by accepting the annexation unconditionally.

P.O. Hand-  
book, No.  
42, p. 57.

Objections  
should be  
sent in  
within a  
reasonable  
time.

Another point raised was whether the notifying Power was to wait indefinitely for replies from all the other Powers. It was proposed to fix a compulsory delay, but this motion was rejected 'through considerations of international courtesy,' and it was agreed to admit a reasonable delay.

Thus a notified Power which did not, within a reasonable time, put forward any claims that it might have to make, would afterwards be foreclosed from doing so.

C.-8056  
(1898), &  
see p. 216  
above.

This principle was appealed to by Lord Salisbury during the Anglo-French controversy with regard to the valley of the Upper Nile. His Lordship, referring to certain 'warnings' which France had received, some of them in the form of communications made directly to the French Government, to the

effect that a seizure of land in that locality could not be accepted by Great Britain, said that 'If France had throughout intended to challenge our claims, and to occupy a portion of this territory for herself, she was bound to have broken silence.'

It is true that, in this case, any duty that may have lain upon France to formulate her objections was only a political one, because Great Britain's claim was merely to a sphere of influence, which does not, by itself, give rise to legal rights. But the principle involved is the same whether applied in the realm of politics or of law.

It is in such a principle that an important legal effect of notification is to be found. The fact that a Power had been directly notified would considerably shorten the period within which it might legitimately put forward its rival claims.

See Bonfin  
§ 567.

*Sanction of the requirement of Article 34 of the Berlin Act.*

It is clear that the validity of a title to territory on the African coasts could not now be brought into question merely on the ground of the non-notification of an acquisition that was made while Article 34 was in full force. But it is of interest to enquire what was the precise nature of the sanction of the requirement to notify in the Berlin Act.

Jèze goes to the length of saying that, even where a State had effectively occupied territory on the coasts of Africa, if it had not notified its occupation to the other Powers, another Power might have hoisted its flag there, notified its taking of possession, and so obtained a better title to the territory than the State actually in occupation. pp. 293-5.

It is true that no title to territory acquired on the African coasts while the Berlin Act was in full force could be considered to be complete and absolute under the Act if the 'essential condition' of notification had not been complied with in respect of it. But it appears to be going too far to say that effectively occupied territory remained open to appropriation by another Power merely through the absence of a notification.

The sanction of the requirement in the Act would appear to have been this. A State taking possession of territory, or assuming a protectorate, on the African coasts without notifying the other Powers thereof would have had no contingent title to the territory while it was settling up an administration there, and might have found itself superseded by another State which, before the administration had been rendered efficient, had formally taken possession, or concluded a treaty for a pro-

tectorate, and notified the fact to the other signatory Powers; in the absence of notification, a full title would have had to await the time when it could be placed upon a prescriptive basis.

On the other hand, a Power which had notified its taking of possession or its protectorate was secured for a reasonable time thereafter—depending upon the difficulty of setting up an administration in the territory—against any subsequent acts on the part of other States; and its position could not be affected even by claims based upon facts antecedent to the notification, if those claims had not been formulated and sent to it within a period after the notification reasonably sufficient for the purpose.

*The assent or recognition of other States.*

The assent  
of other  
Powers  
not a  
necessary  
condition  
of a valid  
title;  
C.-4301  
(1885), 194  
and 215.

In the draft Declaration as originally proposed by the German and French Governments, the object of notification was said to be to enable other Powers to recognize the occupation as effective or to establish their objections. The British Ambassador's suggestion, that the obligation should be limited 'to the fact of the notification alone, without putting the Power which receives it to the alternative of either acknowledging without delay or of formulating its objections on the spot,' did not meet with general approval, although it was pointed out that an occupation would not be truly effective at the moment of taking possession but could only become so later by the fulfilment of the necessary conditions.

In spite of the fact that the reference to the recognition of the effective character of the occupation was omitted from the Article as finally adopted, it might thus appear that there was an idea in certain quarters at the Conference that the title of the acquiring State was in some way dependent upon the acquiescence of other Powers. There seems, however, to be no authority for such a condition; and the Commission refrained from suggesting to the full Conference that it should be imposed in the case of the territories with which the Conference was concerned. 'It resulted,' runs the Report of the proceedings in the Commission, 'from all these discussions that unanimous agreement is not a preliminary requisite to insure the validity of an act of taking possession.'

but is of  
considerable  
political  
importance.

Although the mere assent or dissent of other States does not in law affect the goodness of an otherwise valid title, it may be of considerable moment politically and diplomatically. In some

cases, so effective has been the dissent of other Powers that an agreement made between two States with reference to a territorial title has been set aside on account of it.

For example, the Anglo-Portuguese Treaty of the 26th February, 1884, in which Great Britain, after much previous controversy, agreed to recognize the claim of Portugal to the territory around the mouth of the Congo, extending from 8° to 5° 12' of south latitude on the coast, remained unratified in deference to the objections of other Powers, especially Germany.

Prince Bismarck maintained that Portugal had no stronger claim to the territory in question than any of the other Powers interested in the Congo trade, and declared that he could not, in the interests of German commerce, consent that a coast which had hitherto been free land should be subjected to the Portuguese colonial system. But such an objection could have had no legal validity if Portugal had actually possessed herself of territory to which no other Power had a better claim. Its force was political, and as such it prevailed.

Again, although France and Germany gave a legal form to the objections which, as we have seen, they respectively directed against the leases provided for in the Anglo-Congolese Agreement of the 12th May, 1894, those objections were of doubtful validity from the legal point of view, and such success as attended the protests must again be attributed to political causes.

The political and diplomatic disadvantages flowing from the non-recognition of an acquisition are sometimes utilized by other States to bring pressure to bear upon an acquiring State with a view to obtaining the recognition of rights or the performance of obligations. Thus the British Government refused to recognize the transfer of the territory of the Independent State of the Congo to Belgium until they were satisfied that the Belgian Government were fulfilling their treaty obligations as regards the treatment of the natives.

In one case, however, the mere assent or dissent of other States may be of legal importance. If it should become necessary to determine whether, at a given period in the past, a particular State was sovereign of certain territory, the fact that various Powers had acknowledged or disputed the title of the State at that time may be valuable as evidence upon the point. For example, in the Delagoa Bay Arbitration, Portugal made a strong point of the fact that her rights had been recognized, expressly or tacitly, in the past by other nations; and

Germany's  
objection  
to Portugal  
at the  
mouth of  
the Congo.  
Hartlett;  
Map of  
Africa, etc.,  
III. 1004.  
Scott-Keltie,  
142 sq.  
C.-4205  
(1884),  
2 & 3.

French and  
German  
objections  
to the  
Anglo-  
Congolese  
leases.  
See pp. 215  
& 240 above.

Great  
Britain and  
the Belgian  
Congo.  
Cd. 8606  
(1913), p. 22

The recog-  
nition of  
other  
States in  
the past  
may be  
important  
as evidence  
of title.  
C.-1361  
(1876),  
89 & 108.  
Ib. 248.

among the grounds upon which the French President based his Award in that case in 1875 were the facts that Holland in 1792, Austria in 1782, and England herself in 1817 had accepted the position of Portugal in the disputed territory.

Such a recognition is, of course, of particular importance if it was made by a rival claimant to the territory. Thus the Emperor of Russia in his Award of May 1891, regarding the boundary between French and Dutch Guiana, gave weight to facts showing that the French authorities in Guiana had recognized Dutch dominion over the disputed territory; and the President of the United States, in his Award in the Bulama Arbitration in 1870, found that none of the acts done in support of the British title had been acquiesced in by Portugal.

83 S.P. 428.  
See also  
88 S.P.  
1282 and  
100 S.P.  
1101.

61 S.P.  
1103, *sq.*

### *Summary.*

Thus, although a notification of an acquisition of territory is not an essential condition of the validity of the title thereto, such a notification is advisable, and one of its effects is to curtail the period within which the notified Powers may present any adverse claims in respect of the acquired territory. The notification should be given directly to the Powers to be affected with it, and as soon as possible after the acquisition has been made. It should specify the limits of the area acquired.

The assent of other States is not a necessary element in a valid title, and, apart from the fact that it may subsequently serve as evidence tending to show whether or not the territory belonged to a certain State at a given period, its importance is political and not legal.

## PART IV.

### THE EXERCISE OF THE SOVEREIGNTY.

#### CHAPTER XXX.

##### SCOPE OF PART IV.

THE well-established rule with regard to politically advanced countries is, speaking broadly, that a State may enforce what laws and do what acts it pleases within and in relation to its territory, so long as it does not thereby infringe any of the rights of another State. With regard to its own subjects and their property, it is not under any restriction from International Law. Over foreigners and their property within its territory it may exercise jurisdiction. But its rights of compelling resident or visiting foreigners are limited, particularly in regard to such matters as military service, and it is under an obligation to their State to afford reasonable protection to their persons and property while within its borders.

Hall, I. II.  
§ 10.

Jb. II. IV.  
§ 81.

It may, however, well be that rules which serve for politically advanced countries require to be modified or supplemented when they are applied to newly appropriated and backward territories. Even when the annexation has been completed, the presence of an indigenous population in the territory introduces a factor which might not unreasonably be expected to have some influence upon the rules governing the rights and duties of the sovereign; and where only a part of the sovereignty has passed to the acquiring State the position is quite different from that to which the old-established rules that we have mentioned apply.

In this, the fourth part of this treatise, we shall, therefore, enquire whether any, and what, special and peculiar rights and duties attach to a State in respect of backward territory over which it has acquired the sovereignty either wholly or in part, and we shall deal with the matter as it affects other States and their subjects and as it affects the natives.

## CHAPTER XXXI.

### RIGHTS AND DUTIES OF THE SOVEREIGN WITH RESPECT TO OTHER STATES AND THEIR NATIONALS.

THE rules regulating the rights and duties which a sovereign who has acquired backward territory in full sovereignty can claim *vis-à-vis* other States and their subjects do not differ in principle from the rules applicable in the case of advanced territory. As might be expected, however, special problems are met with in practice due to the peculiar nature of the territory to which the rules have to be applied. And where part only of the sovereignty has been acquired, special considerations arise.

Hall:  
*Foreign  
Powers, etc.*  
§§ 83 sq.  
Jonkyns:  
*British  
Ruler, etc.*  
174 sq.  
Hobart:  
*Govt. of  
India,*  
Ch. V.

*See also*  
Chs. XIX. and  
XXIII. above.

#### *Jurisdiction over foreigners.*

In the first place, nationals of other Powers within annexed territory pass under the jurisdiction of the new sovereign. Where only a protectorate has been set up, the right of the protecting Power to exercise jurisdiction over foreign nationals is now generally accepted, and is correlative with its duty to establish, by agreement with the protected Government, courts conducted on modern lines from which foreigners within the territory can obtain justice. The case where a Power has previously enjoyed privileges of extraterritoriality will be considered in the next Chapter.

#### *Commercial and customs régime.*

An annexing State may set up what commercial and customs systems it chooses, subject to any conditions which may have been imposed upon the territory by such general arrangements as those of the Berlin Act and the Convention of St. Germain, and which may be said to have become part of the law of the continent; and subject also to its own treaties with individual Powers. Thus, when Japan annexed Corea, the Japanese Government claimed that the conventional tariff

Maine:  
*Int. Law*  
Leob. III.  
(84).  
*See Ch.*  
*XXXII.*  
*below.*  
108 S.P.  
691.

hitherto in force in that country ceased to operate, but they agreed 'of their own accord' to maintain the same tariff for ten years. A protecting State can exercise similar powers with the acquiescence of the protected Government, but subject in that case to any treaties in force between that Government and other Powers as mentioned in the next Chapter.

*Nationality and property of foreigners.*

In the case of a full annexation, the nationality of the subjects or citizens of other Powers domiciled in the territory is not affected merely by the annexation; and such persons should be allowed to retain, sell or remove their property in accordance with the principles to be dealt with in Chapter XXXIII. They, however, become subject to the nationality laws of the annexing Power, since, as was held by the Permanent Court of International Justice in its Advisory Opinion of the 7th February, 1923, questions of nationality, as affecting persons within the national territory of a State, fall, in the present stage of International Law, within the domestic jurisdiction of that State.

As regards a protectorate, the question of the right of the protecting Power to legislate respecting the nationality of the subjects of other Powers domiciled within the protected territory was raised, but not settled, in the dispute between Great Britain and France regarding certain nationality decrees which were issued in Tunis and in the French zone of Morocco on the 8th November, 1921. Those decrees purported to confer French nationality, or Tunisian or Moroccan nationality, upon persons born in Tunis or in the French zone of Morocco of parents of whom one was also born in the same territory.

Great Britain refused to admit the application of the decrees to British subjects. France claimed that the question was solely a matter of domestic jurisdiction within paragraph 8 of Article 15 of the Covenant of the League of Nations, and that point was referred to the Permanent Court of International Justice.

Before the Court, the French Government contended 'that the public powers (*puissance publique*) exercised by the protecting State, taken in conjunction with the local sovereignty of the protected State, constitute full sovereignty equivalent to that upon which international relations are based, and that therefore the protecting State and the protected State may, by virtue of an agreement between them, exercise and divide between them within the protected territory the whole extent

In annexed territory.  
*See e.g.*  
105 S.P.  
975.

Advisory Opinion,  
No. 4. *See below.*

In a protectorate.

Perm.  
Court of  
Intl.  
Justice,  
Advisory  
Opinion,  
No. 4.  
*Monthly Summary of the League of Nations*,  
III. p. 3.

of the powers which international law recognises as enjoyed by sovereign States within the limits of their national territory.' This contention was disputed by the British Government. The French also claimed that a Franco-Italian treaty, which conferred upon Italians in Tunis the right to retain their nationality in perpetuity, recognized the French right to deal with the nationality of foreigners domiciled in Tunis.

Cmd. 1899  
(1923).

The Permanent Court found that, since Tunis was only a French protectorate, the matter was not solely within the domestic jurisdiction of France. But the Court was not called upon further to decide the dispute, as the question was settled between the two Governments by an exchange of notes in May, 1923. Under this arrangement it was provided, among other things, that a British subject born in Tunis of a British subject who was himself born there should have the right to decline French nationality, but such right was not to extend to succeeding generations. The French Government also undertook that no attempt would be made to impose Tunisian nationality instead of French nationality on British subjects in Tunis. Each Government maintained its point of view on the general question, and the principle adopted was not to be applicable elsewhere than in Tunis. The question as it affected Morocco, not being at the moment of practical importance, was not pursued.

#### *Neutrality in wartime.*

It would appear to be the duty, both of a full sovereign and a protecting Power, to take all possible steps to ensure that tribes and individuals under its rule or protection observe neutrality during a war in which the Power itself is neutral. Provisions for this purpose in the case of the inhabitants of British protectorates are laid down in the Order in Council of the 24th October, 1904. The experience of the Great War shows that, where a protecting Power is a belligerent, its protected territory of the African type will be regarded as enemy territory by a hostile belligerent.

97 S.P. 220.

## CHAPTER XXXII.

### PRE-EXISTING TREATIES AND EXTERRITORIALITY.

#### Effect on Treaties of Complete Annexation.

SPEAKING generally, treaties and engagements made by the previous sovereign of annexed territory and still current when the territory is annexed, cease thereupon to apply to it; and the treaty arrangements of the annexing State extend to the territory in so far as they are applicable. Treaties which had been made with reference only to the territory annexed are thus abrogated.

Treaties  
are  
abrogated  
by annex-  
tion ;

A condition of affairs which has been set up once and for all by a treaty, e.g. a boundary, is not, however, affected by the annexation. Nor, it would seem, is a general arrangement involving the territory with that of other States, such as the free-trade area which was established in Equatorial Africa by the General Act of the Berlin Conference, and the area of commercial equality into which it has been changed for such of the Powers as have ratified the Convention of St. Germain. Such arrangements may be said to have become part of the public law of the continent, and to be binding on the territory to which they relate, so as to pass with any of it that may be transferred to a new sovereignty.

but not  
(i) perma-  
nently  
established  
conditions,  
or  
(ii) general  
inter-  
national  
arrange-  
ments.

In accordance with the general rule mentioned above, the Resolution of Congress of the 7th April, 1898, for annexing the Hawaiian or Sandwich Islands to the United States, provided that 'the existing Treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such Treaties as may exist, or may be hereafter concluded, between the United States and such foreign nations.'

The United  
States in  
the  
Hawaiian  
Islands.  
F. O.  
Handbook,  
No. 189,  
p. 80.

Again, when Japan annexed Corea in August 1910, the Japanese Government issued a statement which contained the following references to treaties and to the exterritoriality enjoyed in Corea by foreigners :—

Japan in  
Corea.

105 S.P.  
691.

Treaties concluded by Corea with foreign Powers cease to be binding, and Japan's existing Treaties are extended to Corea. Consequently, foreigners are allowed to reside and trade in all parts of Corea, and there to enjoy the same rights and privileges as in Japan proper. At the same time, the right of extra-territoriality which foreigners have hitherto enjoyed in Corea comes definitely to an end from to-day. The Japanese Government believe that they are entirely justified in regarding such right of extra-territoriality as ended upon the termination of Corea's Treaties in consequence of the annexation, considering that the continuance of that system would inevitably prove a serious obstacle and interfere with the unification of the administration of Corea. Moreover, it seems only natural that foreigners, being allowed to enjoy in Corea the same rights and privileges as in Japan proper, should be called upon to surrender the right of extra-territoriality which is not granted to them in Japan proper.

*Treaties purporting to bind future Sovereigns.*

*II.g. 76*  
*S.P. 575 sq.*  
101 S.P.  
693.

In certain of the treaties relating to commercial, consular, and other arrangements which the International Association of the Congo made in 1884 and 1885 with individual Powers represented at the Berlin Conference, it was provided as follows :—

C-4414  
(1885),  
Art. X.

In case of the Association being desirous to cede any portion of the territory now or hereafter under its government, it shall not cede it otherwise than as subject to all the engagements contracted by the Association under this Convention. Those engagements, and the rights thereby accorded to [e.g. British] subjects, shall continue to be in vigour after every cession made to any new occupant of any portion of the said territory.

*See Vattel,*  
*Bk. II. §§*  
*176 & 204.*

A Government that entered into an engagement of this nature would clearly be under a duty to impose the obligations it had contracted upon any successor to whom it might transfer the territory by voluntary cession. But a sovereign who succeeded by right of conquest would apparently be free of them.

*Effect on treaties of the establishment of a protectorate.*

Where a protectorate is set up, pre-existing treaties with the protected Government remain in force. This point was well brought out in the discussion between the British and French Governments with regard to the treaty rights which Great Britain had enjoyed in Madagascar before the French protectorate over the Island was established.

*Great Britain and France and Madagascar.*

Great Britain had a Treaty with Madagascar dated 27th June, 1865, by which trading rights in practically the whole of the Island were conferred upon British subjects, and Great Britain was granted most-favoured-nation treatment in regard to commerce and all other matters, including the purchase and leasing of land and other property. The Treaty also provided for perfect freedom of trade between Great Britain and Madagascar, subject to the imposition of import and export duties up to 10 per cent.

89 S.P.  
1038 *sq.*  
90 S.P.  
487 *sq.*

On the conclusion of the Treaty of the 17th December, 1885, by which the Government of the Island transferred the control of its external relations to France, the French Government assured the British Government that the arrangement would not affect existing treaties between Madagascar and other States, and that the French had no intention of placing obstacles in the way of the free development in Madagascar of the private interests of the nationals of other Powers.

*See Ch.*  
*xxiii.*  
*above.*

This assurance was confirmed in the Declarations of the 5th August, 1890. By those Declarations, the British Government recognized the French protectorate over Madagascar, with its consequences, and the French Government undertook that the establishment of the protectorate should not affect any rights or immunities enjoyed by British subjects in the Island.

82 S.P. 82.

In 1894, the French found it necessary to compel the Hova Government by military force to recognize their protectorate, and, by the Treaty of the 1st October of the following year, the Queen of Madagascar accepted 'le Protectorat de la France avec toutes ses conséquences.' The following month, the French Minister for Foreign Affairs announced, somewhat prematurely, that the Island had become a French possession. He added that the French Government would respect the engagements it had entered into with certain foreign Powers, and that

Quant aux obligations que les Hovas eux-mêmes ont pu contracter au dehors, sans avoir à les garantir pour notre propre compte, nous saurons observer, avec une entière loyauté, les règles que le droit international détermine au cas où la souveraineté d'un territoire est, par le fait des armes, remise en de nouvelles mains.

On the 18th January, 1896, the Queen of Madagascar signed a fresh Deed by which she took cognizance of 'la Déclaration

88 S.P.  
1223.

89 S.P.  
1052.

de prise de possession de l'Ile de Madagascar par le Gouvernement Français.' The Deed did not specifically mention a protectorate, but appeared to continue the régime set up by the Treaty of the preceding 1st October; and the French Government admitted that France had not annexed the Island and that the internal sovereignty remained with the Queen.

In these circumstances, the British Government maintained that the British treaties with Madagascar remained in full force, and that the proposals which had been made to introduce the French customs régime, with preferential treatment for French products, were inconsistent with those treaties.

Referring to a parallelism between Madagascar and Zanzibar, which had been drawn by a previous French Minister for Foreign Affairs, Lord Salisbury said :—

In both States the Ruler remains in undisturbed possession of the throne, and retains the attributes of internal sovereignty, while the Protecting Power exercises the attributes of external sovereignty. In both the position of foreign Powers should be identical. Your Excellency is aware that the French Government has hitherto acted consistently upon the principle that in Zanzibar the Treaty rights of France remain intact, and have in no way been detrimentally affected by the proclamation of the British Protectorate.

And in connection with the French Minister's statement that the position of the British Government with regard to the Protected States of India furnished a precedent for the status of the Island, His Lordship observed :—

It has, however, never been contended that if those States had had pre-existing Treaties with foreign Powers the assumption of Protectorate by Great Britain would have abrogated those Treaties. It could not have had, and in no case has had, such consequences.

In support of his position, Lord Salisbury quoted as follows an opinion of Vattel, which, he observed, appeared to be directly applicable to the case in question :—

*See Vattel,*  
*Bk.II. § 204.*

Since a nation or a State, of whatever kind, cannot make any Treaty contrary to those by which she is actually bound, she cannot put herself under the protection of another State without reserving all her alliances and all her existing Treaties. For the Convention, by which a State places herself under the protection of another State, is a Treaty; if she does it of her own accord she ought to do it in such a manner that the new Treaty may involve no infringement of her pre-existing ones.

With a view to meeting the objections of the British Government, and similar objections that had been advanced on behalf of the United States, a French law was passed declaring Madagascar to be a French colony; and the French Government contended that this consummation of the French conquest of the Island should dispose of any claims that the treaties that had been made by the native Government were still in force. 'La Grande Ile,' said the French Minister for Foreign Affairs, *89 S.P. 1089.*

*'étant désormais placée sous la souveraineté directe de la France, ne saurait être régie par d'autres règles que celles de notre législation et de notre droit conventionnel. Il y a là un principe universellement consacré par le droit international et par la pratique des nations.'*

The British Government, however, were still unprepared to relinquish their claims. 'The annexation now announced to take place,' said Lord Salisbury, 'had a different effect upon our rights than any which any other annexation would have had, on account of the previous pledges which we had received from the Government of France.' And again:— *89 S.P. 1089.*

But even admitting that a French annexation will have generally the effect of sweeping away the Treaties into which the Queen of Madagascar had previously entered, it can have no effect upon the claims and just expectations created by the sanction which those Treaties, and the rights arising under them, have received from France herself. By first assuring Her Majesty's Government that the Protectorate would not affect the immunities and rights of British subjects, and then making a public announcement that the expedition had no aim beyond that of sustaining the Protectorate, the French Government have precluded themselves from taking advantage of the military results of the expedition in order to destroy the British rights which they had recognized. *Id. 1072.*

On the same grounds, the British Government protested against a French decree which conferred special privileges on French colonists in connection with the holding of land, and against the unfair manner in which the French officials endeavoured to stifle British trade in the Island.

The United States Government acquiesced in the view that the French conquest of Madagascar had put an end to the Malagasy sovereignty and therefore to the treaties which had subsisted between the United States and the Malagasy Government, and asked for an assurance from the French Government that the treaties between the United States and France were applicable to Madagascar as to French territory.

97 S.P. 54. Finally, in 1904, Great Britain withdrew her objection to the introduction of the French customs tariff, as part of a bargain involving also French claims in Zanzibar.

*Great Britain and France and Tunis.*

The point that the mere establishment of a protectorate does not affect treaties between the protected Government and other States was also insisted upon by Great Britain and admitted by France when the French protectorate over Tunis was set up in May 1881; in fact, the Treaty between the French Government and the Bey of Tunis contained the following stipulation:—

C.-2888 & 2942 (1881). The Government of the French Republic guarantees the execution of the Treaties at present existing between the Government of the Regency and the different European Powers.

C. 3843 (1884). Later, when the French, having established tribunals of their own in Tunis, wished to bring to an end the consular jurisdiction which had been enjoyed by the Powers under the capitulations, Great Britain, in agreeing to entertain the French proposal, expressly reserved all the other rights and privileges, commercial and otherwise, guaranteed to her by treaties.

*Voluntary alteration of Treaty Régime.*

M.g. 97 S.P. 954, 107 S.P. 818, 109 S.P. 872, 110 S.P. 915, 112 S.P. 1108 & 1166. It is, of course, open to the Powers concerned to agree to modifications of their treaty arrangements, and in certain cases, where the protecting Power has obtained considerable control over internal affairs in the protected territory, as in the case of France in Tunis, and of France and Spain in Morocco, various Powers have agreed to the substitution of their treaty arrangements with the protecting Power for those made with the protected Government.

**Effect on extraterritorial privileges of complete Annexation.**

In the case of a complete annexation, all persons, of whatever nationality, within the annexed territory become subject to the jurisdiction of the annexing Power, and in the absence of express agreement any extraterritorial privileges previously enjoyed by other Powers come to an end. This principle, as

we have seen, was acted upon by Japan when annexing Corea. It is also supported by the incidents which occurred in connection with the Italian occupation of Massowah.

The Italians had occupied Massowah in 1885 after its evacuation by the Egyptian forces. In 1887 they laid certain taxes upon householders and tradesmen, both Italians and foreigners. Two Frenchmen, as well as a Swiss and twenty Greeks who were under the protection of the French consul, refused to pay the taxes, and their refusal was supported by the French Government, on the ground that the capitulations still existed in Massowah. Italy argued that, 'when a Christian nation undertakes the administration of the affairs of a Mussulman country, the Capitulations have no longer any reason to exist'; and in this contention she was supported by Great Britain and Austria-Hungary, while Germany expressed her willingness to set the capitulations aside as long as the Italians remained at Massowah. Fortified by this support, the Italian Government refused to discuss the matter further with the French.

Italy in  
Massowah.  
*Francesco  
Crispi,*  
*Memoirs of.*  
II., Ch. IX.  
F.O. Hand-  
book, No.  
126, p. 14.

#### Effect on extritorial privileges of the establishment of a Protectorate.

The mere establishment of a protectorate, however, does not automatically bring to an end any extritorial privileges in existence in the territory.

Cromer:  
*Modern  
Egypt, I.*  
332.

Great Britain's consent to the abolition of her consular courts in Tunis was based upon the principle that there was no sufficient reason for maintaining consular jurisdiction in that country when the native courts were superseded by French tribunals. 'The institutions which have grown up under the Capitulations with Turkey,' wrote the British Foreign Minister in connection with this question in 1882, 'have been found essential for the protection of foreigners under the peculiar circumstances of the Ottoman Empire, and the necessity for them disappears when Tribunals organized and controlled by an European Government take the place of the Mussulman Courts.' Great Britain, however, required various explanations from the French Government before consenting to close her consular courts, and only did so when the French agreed to certain conditions which she proposed.

Great  
Britain and  
Tunis.  
C.-3843  
(1884).

See  
Advisory  
Opinion  
No. 4 of the  
Perm.  
Ct. of Intl.  
Justice,  
§ V. (2).

A few years later, as we have seen, France was disputing, in respect of the Italian occupation of Massowah, the principle

France and  
Massowah,

Madagas-  
car and  
Zanzibar,  
89 S.P.  
1077 sq.

which Great Britain had admitted in connection with the French protectorate over Tunis. In 1896, however, when Great Britain proposed to make the renunciation of her exterritorial privileges in Madagascar, while the island was yet only under French protection, conditional upon a reciprocal surrender of French exterritorial privileges in Zanzibar, the French Government objected to the condition. They then argued that the principle already acted upon, both by Great Britain and France, was 'that when a European system for the administration of justice had been established, the reason for the exterritorial jurisdiction ceased.' Eventually Lord Salisbury agreed to recognize the jurisdiction of the French tribunals over British subjects on receiving an assurance that the French Government were prepared to abandon their right of jurisdiction over their nationals in Zanzibar as soon as properly constituted British courts had been set up there.

Great  
Britain in  
Egypt.  
Cromer;  
*Modern  
Egypt*, II,  
Ch. LII.  
Cmd. 1131  
(1921), p. 19  
Cmd. 1437  
(1921), p. 12.

Cmd. 1237,  
1285, 1391,  
& 1498.  
114 S.P.  
199, 380,  
390.

Consent is  
usually  
given to  
the closing  
of consular  
courts.

*E.g.* 98 S.P. 107;  
99 S.P.  
387 & 375;  
106 S.P. 1034;  
107 S.P. 818;  
108 S.P.  
470 & 876;  
109 S.P. 938;  
110 S.P. 915.

In Egypt, where a large number of legislative, jurisdictional and other exterritorial privileges had grown up under the Capitulations in favour of fifteen Powers, their abolition during the period preceding the Great War was found, in the main, to be impossible, owing in part to the absence of any guarantee that the British occupation would be permanent. In the period during which the proclamation of a British protectorate remained in force, however, negotiations between Great Britain and the principal Capitulatory Powers for the abolition of these privileges made considerable progress; and certain Powers agreed to renounce, in favour of Great Britain, all the rights and privileges which they held in Egypt under the Capitulations, so long as Great Britain exercised in Egypt the control necessary to protect foreign interests.

And although it cannot be said that exterritorial privileges are brought automatically to an end by the establishment merely of a protectorate, it is the practice, where the protecting Power appears to be permanently established in the territory, and has set up its own courts there, for other Powers to consent at all events to forgo their consular courts, and to place their nationals under the jurisdiction of the courts of the protecting Power. But such consent must be obtained in the case of each Power concerned, as was done, for example, by Great Britain in respect of Zanzibar and by France and Spain as regards their respective zones in Morocco; and it is open to a Power to attach conditions to its renunciation as Great Britain did when agreeing to close her courts in Tunis.

Exterritorial privileges enjoyed by virtue of most-favoured-nation arrangements come automatically to an end when all the nations who previously enjoyed similar privileges under express agreements have voluntarily relinquished them. This view was acquiesced in by the Austro-Hungarian and Belgian Governments when the other Powers who had enjoyed exterritorial privileges in Zanzibar agreed to forgo them on the establishment of British courts in the protectorate.

Consular  
juris-  
diction  
under most  
favoured  
nation  
arrange-  
ments.  
101 S.P.  
232 *sq.* & 648.  
*See also* 656.

## CHAPTER XXXIII.

### PROPERTY BELONGING TO FOREIGNERS.

Private  
rights  
should be  
respected,  
•

but not  
without  
scrutiny.

See e.g.  
*In re*  
*S. Rhodesia*,  
1819, A.C.  
at 238.  
92 S.P. 45.  
93 S.P. 32.  
Omd. 1226  
(1921).

See e.g.  
86 S.P.  
1194 (*Brit.*  
*Bechuana-*  
*land*).  
114 S.P.  
236 (*New*  
*Hebrides*).

Land in  
New  
Zealand.  
Hight &  
Bamford,  
p. 215.

IN accordance with the general rule, rights of private property, including land and concessions, which foreigners have acquired in backward territory, remain unimpaired when the territory passes under the sovereignty of an advanced State, and become subject to such general laws as the sovereign may see fit to retain or enact for the territory.

But the new sovereign is under no obligation to recognize without scrutiny any claim to property that may be put forward. Documents purporting to be evidence of title have sometimes been obtained from native chiefs who have had no idea of the nature of the transaction to which they are claimed to have assented, or who have had no power to convey the property, or have accepted an utterly inadequate consideration for it. Where any such fact is found, the new sovereign may and should refuse to recognize the alleged title in whole or in part, and should make such a disposition of the property as is fair to the foreign claimant and the previous native owners, having regard to all the circumstances, including the length of the claimant's occupation of the land and the amount of labour and capital he has expended upon it.

When Great Britain annexed New Zealand in 1840, English law did not permit an alien to hold land within the British dominions; nevertheless the British Government instructed the Governor of the colony to acknowledge undisputed claims to land by aliens who had acquired from the chiefs, and to treat doubtful claims on the same footing as similar claims by British subjects, i.e., to require proof that the transactions could be justified by considerations of real justice and good conscience.

\* See Ch. XXXVII. below, & e.g. 105 S.P. 697 (*Corea*), & 102 S.P. 127 (*Malay States*). Omd. 1226 (1921) & 114 S.P. 402 (*Mesopotamia*).

*Claims to lands in Fiji.*

The difficulties which may arise in adjudicating upon such claims were well brought out in connection with certain German and American claims to lands in Fiji. The Instrument of Cession by which those Islands were transferred to the British Crown in October 1874, vested in the Crown, in addition to the full sovereignty and dominion over the Islands and their inhabitants, 'the absolute proprietorship of all lands, not shown to be now alienated, so as to have become *bona fide* the property of Europeans or other foreigners, or not now in the actual use or occupation of some Chief or tribe, or not actually required for the probable future support and maintenance of some Chief or tribe.' It further provided that all claims to titles of land, by whomsoever preferred, should, in due course, be fully investigated and equitably adjusted.

C.-1114  
(1875).

In accordance with these provisions, the British Government's Instructions to the Governor, of March 1875, included the following directions :—

C.-1337  
(1875).

That, with the view of disturbing as little as possible existing tenures and occupations, and of maintaining (as far as practicable, and with such modifications only as justice and good policy may in any case appear to demand) all contracts honestly entered into before the cession, the Colonial Government, to which the rights of the Crown are delegated in that behalf, should forthwith require all Europeans claiming to have acquired land by purchase, to give satisfactory evidence of the transactions with the natives on which they rely as establishing their title; and if the land appears to have been acquired fairly and at a fair price, should issue to the persons accepted, after due inquiry, as owners, a Crown Grant in fee simple of the land to which they may appear entitled, subject to any conditions as to further payments and charges or otherwise, which may be just.

The Commissioners who, in the first instance, dealt with the claims sent in reported that, by Fijian custom, the absolute alienation of land was unknown, and therefore strictly speaking illegal; but that they had nevertheless recognized claims to lands purchased from the chiefs in cases where the transaction had been carried out *bona fide* by the purchaser, and the price paid was reasonable in all the circumstances. In cases where the price paid was entirely inadequate, an equitable proportion of the lands claimed had been granted. Further, even where

C.-3584  
(1883),  
p. 56 *sq.*  
C.-4493  
(1885),  
p. 5 *sq.*

C.-3815  
(1883),  
p. 10.

the original title was bad, *bona fide* occupation by the European claimant had in every case been recognized by liberal Crown grants *ex gratia*. Claims had, however, been disallowed where both the sale and the occupation had been based upon violence and outrageous wrong; and also in such cases as that of the Island of Na Oula, in which the chiefs (who included the paramount chief or 'king') purporting to sell had no title to the land, which had since remained 'in the undisturbed ownership and occupation of certain Natives, who were no parties to the sale, and whose predecessors had held possession as owners from time immemorial.'

The  
German  
claims.  
C.-4433  
(1885),  
p. 11.

C.-3815  
(1883).

The German Government, while admitting that the German claims had been dealt with in the same way as the claims of British subjects and persons of other nationalities, pressed for the reconsideration of certain claims which had been rejected both by the Land Commissioners and by the Appeal Tribunal. They took exception to the constitution of the Land Commission, and to the fact that the Governor had a voice in the decision both on the report from the Land Commission and on appeal, and they claimed that, both according to the wording of the Treaty of Cession from the chiefs, and according to the common principles of International Law, 'the right to lands which German subjects had acquired there previous to the English annexation could only be unrecognised in cases of proved *mala fides*,' and that 'according to the opinion of the German Government, in all cases where the legal acquisition is duly proved by documentary evidence, in forms recognised as valid under the earlier sovereignty, or where in default of such documentary evidence positive proofs have not been brought against the *bona fide* acquisition, the property of the respective subjects of the German Empire should be recognised and confirmed'; or if the land in question had been already transferred to natives or appropriated to public purposes, compensation should be paid.

The British Government would not admit that documents put forward as evidence of title should always be accepted at their face value, without enquiry as to the right of the chief whose mark they bore to make the transfer or as to whether he understood the nature of the transfer he was supposed to have made. They refused to allow German claims to land which had been finally rejected to be reopened. They maintained that the claims put before the Land Commission had been dealt with with 'the greatest industry, fairness and discretion'; and that

any possibility that native rights which had been finally upheld might be again called in question would have an unsettling effect upon the native population.

Out of courtesy to the German Government, however, the British Government agreed to the appointment of an Anglo-German Commission of two to enquire 'whether the awards of the Fiji Land Commission have, in any case specially submitted by the German Government, resulted in such disappointment to a German claimant as could possibly be made the subject of compensation'; but any such compensation was to be in the form of a money payment to be made to the German Government.

C.-4433  
(1885),  
p. 88.

Claims amounting to £140,000 were presented to the Commission, by whom they were reduced by a unanimous finding to £10,620, which the British Government agreed to pay and the German Government to accept. The Commission agreed that the Land Commission had dealt with the claims with fairness and carefulness. The main difference between the Commissioners appeared to be that the British Commissioner was of the opinion 'that the right of the tribesmen to be consulted in sales of land [by the chiefs] is established and was properly recognised by the Land Commissioners as an important element to be considered, and that they did not give it undue weight in connection with other considerations'; while the German Commissioner thought 'that that principle was carried too far, and that sufficient weight was not given to the *bonâ fides* of those who made their purchases in the belief that the Chiefs, in consequence of their increased influence during the time immediately preceding the cession of Fiji, had not only the power, but a customary right, to sell land without the concurrence of the tribesmen.'

15. p. 109 *sq.*

Certain American claims, which had been rejected by the Land Commissioners in Fiji between 1878 and 1884, came before the American and British Claims Arbitration Tribunal in 1928. The claimants alleged that the lands in question had been purchased from Fijian Chiefs before the British acquisition of the Island. The Tribunal distinguished between want of power in, and the possible abuse of power by, the chiefs. In certain cases, they came to the conclusion, on a review of all the circumstances, that the chiefs had power to convey; and they awarded the claimants damages. In other cases, they found that the chiefs, who had purported to make the conveyances, were at the time rebels against and fugitives from the para-

The  
American  
claims.  
*Am. Jl. of  
Int. Law*, 18,  
pp. 314-35.

mount chief, and had no power to sell the lands ; and they disallowed the claims.

*Personal Contracts relating to Land.*

1819 A.C.  
at 218 sq. &  
236 sq.

The concession which Lobengula, King of Matabeleland and Mashonaland, granted to Lippert, a German financier, in 1891, gave him the exclusive right 'to lay out, grant, or lease, for such period or periods as he may think fit, farms, townships, building plots, or grazing areas.' But the concession 'did not make any land his, nor did it enable him to make it his own. What land he appropriated to others was to be appropriated in Lobengula's name.' In these circumstances, the Judicial Committee of the Privy Council found, in 1919, that the concession was at most a personal contract, and did not bind the British Government, who succeeded Lobengula by right of conquest.

See also  
*West Rand,*  
*etc., Co. v.*  
*Rim* (1905),  
2 K.B. 391.

*Private Property acquired by Occupation.*

Spits-  
bergen.  
118 S.P.  
789.  
Cmd. 2092  
(1924).

A case in which there were no aboriginal inhabitants from whom property rights could have been acquired, so that claims to land and mines had their origin in acts of occupation, is that of Spitsbergen. When, in 1920, the Archipelago was annexed by Norway with the consent of the Powers concerned, it was agreed, *inter alia*, that doubtful claims to land should be referred to a tribunal of arbitrators who were to take into consideration, in addition to any applicable rules of International Law and the general principles of justice and equity, the following circumstances, viz. :—

(1) The date on which the land claimed was first occupied by the claimant or his predecessors in title ;

(2) The date on which the claim was notified to the Government of the claimant ; and

(3) The extent to which the claimant or his predecessors in title had developed and exploited the land claimed.

New  
Hebrides.  
114 S.P.  
234.

In the Anglo-French Protocol of August 1914, respecting the New Hebrides, it is provided that where occupation is made the sole ground of a claim to ownership of immovable property by non-natives as against natives 'visible and material proofs must be forthcoming, such as buildings, plantations, cultivation, cattle-rearing, improvements, clearing, or fencing.' More-

over, 'occupation must be *bond fide*, and have been continuous during a period of three years at least.'

*Case of a Protectorate.*

The establishment merely of a protectorate does not entitle the protecting Power to deal with private rights to land in the protected territory, and any such power must be based upon express grant or acquiescence on the part of the local Government. It is also subject as to its exercise to any limitations or conditions that may be set by International Law or general practice to a similar power when exercised in annexed territory.

*See In re  
S. Rhodesia,  
1919 A.C.  
at 241.*

## CHAPTER XXXIV.

### RIGHTS AND DUTIES OF THE SOVEREIGN WITH RESPECT TO THE NATIVES.

In spheres  
of  
influence.

UNTIL a State has advanced at least as far as the stage of proclaiming a protectorate over a certain region, it can claim no territorial rights in respect of it. In the countries within its sphere of influence, it will in general endeavour to prevent local wars, put a stop to inhuman practices, improve the systems of government, and secure the safety of traders and travellers. But it will have no legal right to interfere with the autonomy of the local rulers, and no jurisdiction over any of their people.

In a pro-  
tectorate.

In the case of a protectorate, the powers of a protecting State may be limited to the right to demand that the native authority shall have no direct dealings with third States, with the consequential right of supervising and dictating the policy of the protected Chief or Government in matters affecting foreigners; or the protecting State may, as we have seen in Chapter XXIII, have acquired powers in respect of all or any of the branches of internal government, and to any extent.

Perm. Ct.  
of Intl.  
Justice,  
Advisory  
Opinion  
No. 4 § V. (1).  
*See e.g.*  
104 S.P.  
572,  
Ridge:  
*Constitutional*  
*Law, etc.*,  
482 *sq.*

But such powers must be based upon the express or implied consent of the native authority. In exercising them, a protecting State is not, it is true, necessarily acting as the agent of the native authority. The powers which it possesses may have been transferred to it outright, so as to be properly exercised in its name and under its sole authority. But the scope of those powers is determined by the extent to which their transfer has been acquiesced in, either expressly or tacitly, by the native authority, and unless this acquiescence can be shown in regard to any particular power, the right to its exercise belongs to the native authority and not to the protecting State. Thus, the Decree of the 4th November, 1908, of the Sultan of Zanzibar recites that 'the jurisdiction of the British Court as now established can be extended to other foreigners [i.e. foreigners

101 S.P.  
648.

whose Governments did not enjoy rights of extraterritoriality] in pursuance of a Decree issued by us.'

The native inhabitants of a protectorate have not become the nationals of the protecting State, and that State cannot validly compel them in any particular way or deal with their property, unless the right so to do flows from one of the transferred powers. Moreover, any such powers would, of course, be subject to any limitations that may be imposed by International Law or general practice on similar powers when exercised in fully-acquired territory.

When the territory has passed beyond the stage of a protectorate, and has been annexed by the protecting State, all the residual powers of internal government pass to that State, and the natives become its nationals. They are fully under its jurisdiction and its legislative and administrative authority. But, in some cases by explicit international agreement, in others by general usage, these powers over the natives have been tempered and modified to an extent which we shall consider in the succeeding Chapters.

In fully  
acquired  
territory.

See Lewis  
in *Law  
Quarterly  
Review*,  
30, p. 468.

## CHAPTER XXXV.

### CAN THE DUTIES OF THE SOVEREIGN WITH RESPECT TO THE NATIVES BE LEGAL DUTIES ?

*See Obs. V.  
& XXI.  
above.*

We have already shown that there is good reason for saying that International Law recognizes the possession of sovereign rights by independent politically-organized nations or communities, however backward, to the extent that it teaches that a valid title to their territories can be based only upon Cession, Prescription, or Conquest. We have also seen that a State claiming to have set up a protectorate over such communities must be able to show their express or implied acceptance of the protectorate if its claim is to be legally valid.

But does International Law go farther and, after a backward region has passed under the sovereignty of a modern State, prescribe a code of duties that ought to be observed towards the inhabitants of that region by its sovereign ?

*Inter-  
national  
duties are  
owed be-  
tween  
States as  
such ;  
See Ch. X.  
above.*

It might at first sight appear that International Law can have no place for such a code. The persons with whom International Law deals are sovereign States or communities ; it bestows no rights upon individuals or groups of individuals as such, and consequently no duties which it enjoins are enforceable by individuals. Such duties may, it is true, have regard to individuals either separately or collectively, but usually to them considered as members of their State ; and in the view of International Law it is the rights of the State, and not of the individuals, that have been infringed if those duties have not been observed.

It might, therefore, seem to follow that, when a country inhabited by a backward people has passed under the full sovereignty or the protection of a member of the International Family, the relations between the sovereign or protector and the natives can be no matter for regulation by International Law. But such a conclusion would seem to be unsound, and that on three grounds.

(i) *The consensus of States makes law irrespective of the incidence of the benefits resulting or of the nature of the obligations assumed.*

In the first place, although the duties which International Law enjoins upon a State are not only owed to other States but also, as to their content, have regard for the most part only to those other States or their nationals, there appears to be no reason why every duty which International Law imposes should have such a content. If a rule has in fact been agreed to by all those members of the International Family whose consent can be regarded as necessary to give it legal validity, that rule should be considered to be a rule of law irrespective of the incidence of its benefits, or of the nature of the obligations which each State has thereby assumed.

but the duties need not be for the sole benefit of those States.

(ii) *Rules which can be made binding between particular States by treaty can also be made rules of general law.*

Again, where a number of States have entered into a specific agreement among themselves with regard to the treatment which each will accord to native populations under its control, it is generally recognized that such obligations so undertaken are binding upon the Signatory States *inter se* none the less because the agreement has been made in the interests of peoples who are not parties to it and are not members of the International Family.

Treaties for the benefit of native populations, who are not Parties, bind the Signatory States ;

It is true that the Foreign Secretary of the Independent State of the Congo in 1906 put forward, 'although not very decisively,' a different view with regard to the provisions of Article 6 of the General Act of Berlin. By that Article, the Powers exercising sovereign rights or influence in the conventional basin of the Congo 's'engagent à veiller à la conservation des populations indigènes et à l'amélioration de leurs conditions morales et matérielles d'existence et à concourir à la suppression de l'esclavage et surtout de la Traite des Noirs.' The Foreign Secretary contended that these engagements were 'a declaration of general principles and intentions as regarded the treatment of the native populations rather than a binding obligation which the remaining Signatories, or any one of them, had a right to enforce.'

Od. 8002 (1906), p.19.

Great Britain, however, contested this view, and consistently maintained that the provisions of the Act were binding as between the Powers who were parties to it. Moreover, at an earlier stage of the Congo controversy, the Congo Government themselves had expressly recognized the obligatory character

*Ib. See also*  
Cd. 1809  
(1903).  
96 S.F.  
536.

Cd. 1833  
(1804), p. 2.

Cd. 6806  
(1913),  
p. 22.

98 S.P.  
114.  
Cd. 2736  
(1905).

duties to  
native  
popula-  
tions may  
similarly  
become  
rules of  
general  
law.  
*See Preface.*

The slave  
trade is —  
prohibited  
by Inter-  
national  
Law ;  
*Le Louis*  
(1817), 2  
Dodson at  
251.  
*The Anti-*  
*slavery* (1825),  
10  
Whiston's  
Reps. at  
121.

other  
duties  
towards  
the natives

of the Act : ' Il (the Congo State) tient,' ran the Congo Government's Note of September 1903, ' à se montrer fidèle observateur de l'Acte de Berlin, de ce grand Acte International qui lie toutes les Puissances Signataires ou adhérentes, en ce que dit le sens grammatical si clair de son texte, que nul n'a pouvoir de diminuer ou d'amplifier.' Later, the British Government refused to recognize the transfer of the Congo Government's territory to Belgium until they were satisfied that the Belgian Government were fulfilling their treaty obligations in regard to the treatment of the natives.

Again, the arbitrators in the case of the Muscat Dhows, in their Award of August 1905, at the Hague Court of Arbitration, definitely held that Article 32 of the General Act of the Brussels Conference, which was framed with a view to helping forward the suppression of the slave trade, bound the Signatory Powers *inter se*.

And if duties of this nature are legally binding upon States who have entered into definite obligations with other States for their performance, it is difficult to see why similar duties should not be equally binding upon all the members of the International Family, where it can be shown that the performance of those duties does, in fact, command that 'consensus of civilized States' which is required to invest a given rule with legal sanctions.

(vii) *In one instance, at least, duties to backward peoples admittedly form suitable subject-matter for International Law.*

There is yet a third avenue of approach to this conclusion. We shall see in a later Chapter that the slave trade is now recognized to be prohibited by International Law. Moreover when, in the early part of the nineteenth century, the Courts in England and the United States found themselves obliged to hold that no such prohibition by International Law then existed, they did not base their conclusion upon the ground that the protection of aboriginal peoples was not suitable subject-matter for a rule of law binding upon advanced nations. On the contrary, their arguments proceeded upon the assumption that the prohibition of the traffic might well have been embodied in such a rule, for they were addressed to the question whether all the members of the International Family concerned had in fact at that time agreed so to embody it.

And if the slave trade can be forbidden by International Law in the interests of the victims of the traffic, there is no reason why other rules regulating the relations between the

colonizing Powers and the indigenous inhabitants of the regions they acquire should not be capable of resting upon a legal basis.

might therefore be similarly imposed.

*Subject backward races admitted to be protectable by International Law.*

It was, in fact, agreed at the Berlin Conference that the native populations ought not to be considered to be outside the community of International Law, although they were not in a position to defend their own interests, and the Conference had been obliged to assume in respect of them the position of a guardian (*tuteur officieux*).

The Berlin Conference, C.-4361 (1885), p. 65.

To the same effect, Sir John Macdonell, dealing with the extent to which civilized nations had recognized their duties to uncivilized or semi-civilized nations, and after considering in particular the Berlin and Brussels Acts, came to the conclusion that 'closely connected with, if not a part of, International Law is a group of duties on the part of the dominant races to those under their control or influence.'

Sir John Macdonell, *Journal of Soc. of Comp. Legistn.*, XII. 290.

*Such duties would be owed to the other members of the International Family.*

It does not result from this that International Law may bestow rights upon individuals. The duties so laid upon each Power would, from the legal standpoint, be owed to the other members of the International Family, whose sense of justice and standard of morality had demanded the observation of a certain level of conduct on the part of the powerful nations in dealing with defenceless backward peoples, and who, in order to ensure as far as possible that that level should be reached in all cases, had made reciprocal promises with regard to their own actions in relation thereto.

See Oppenheim, I. § 292.

In the following Chapters we shall consider to what extent rules of this kind have actually received the assent of those members of the International Family who are affected by them.

## CHAPTER XXXVI.

### THE WELFARE AND ADVANCEMENT OF THE NATIVES, AND THE DOCTRINE OF TRUSTEESHIP OR WARDSHIP.

#### *The natives in the earlier periods of colonization.*

Prescott:  
*Ferdinand  
& Isabella*,  
Pt. II. Ch.  
XXVI.

In the earliest periods of European expansion into countries inhabited by backward peoples, little or no respect was, as a rule, paid to the lives or liberties of the natives; and even after making allowance for the antagonism and ill-will sometimes, though not always, displayed by the aborigines towards the settlers, the story of their treatment at the hands of the Europeans is a painful one.

The earlier  
plea was  
the con-  
version of  
the natives  
to Chris-  
tianity ;  
\*  
but this  
object was  
largely  
defeated by  
the cruelty  
of the  
colonists.

The plea advanced to justify the acquisitions of the fourteenth to the seventeenth centuries was the conversion of the natives to Christianity. This was one of the objects of the papal grants. To Ferdinand and Isabella it appeared as a duty that they were no less anxious to discharge than they were to amass the fabled wealth of the Indies. It was urged upon English and French colonization Companies by their charters.

Prescott, *op. cit.*  
Pt. I., XVIII.  
Pt. II., VIII.  
& XXVI.  
Maine:  
*Int. Law*,  
Lect. IV.

The profession of so worthy an object did not, however, protect the natives from gross ill-treatment and injustice at the hands of the settlers. In Spanish America, in spite of the humane instructions given to Columbus by the Spanish Court, and the noble advocacy of Las Casas, the colonists treated the Indians with unprovoked and shameless cruelty; they subjected them to the worst horrors of slavery under the system of *repartimientos*, and exterminated them by the million.

Markham:  
*The Incas*,  
Ch. XVIII.

This aspect of the Spanish conquest of Peru so weighed upon the last survivor of the original conquerors that he felt obliged to unburden his conscience to his King in his Will. In this document, which is dated 1589, after describing the honesty and virtue of the Peruvians before the conquest, he proceeds as follows: ' But now they have come to such a pass, in offence of

\* Prescott: *Ferdinand & Isabella* I. Ch. XVIII. Fletcher, Alice C.: *Indian Educa-  
tion*, etc., p. 23 sq. And see Ch. XII, above.

God, owing to the bad example that we have set them in all things, that these natives from doing no evil, have changed into people who now do no good or very little.'

In the main, the earliest English colonists in North America extended their settlements westwards by waging pitiless war against the Indians who opposed their progress. In the Dutch East Indies the natives were exterminated without scruple to further the plans of their European masters.

'It is not too much to say,' runs the Report of the House of Commons Select Committee of 1837, 'that the intercourse of Europeans in general, without any exception in favour of the subjects of Great Britain, has been, unless when attended by missionary exertions, a source of many calamities to uncivilized nations.'

'Too often,' continues the Report, 'their territory has been usurped; their property seized; their numbers diminished; their character debased; the spread of civilization impeded. European vices and diseases have been introduced amongst them, and they have been familiarized with the use of our most potent instruments for the subtle or the violent destruction of human life, viz. brandy and gun-powder.'

#### *The doctrine of Trusteeship or Wardship.*

In less remote times, while instances of oppression and cruelty have not been absent—it will be sufficient to recall the cases of German South-west Africa and of the Congo Free State while it was under the revenue-raising régime of King Léopold—Governments and peoples at home have been more and more concerned with the general welfare of the natives under their control. Their professed aim has been to raise them in the scale of civilization, and furnish them with the mental and manual training and the material equipment necessary to enable them to improve their conditions; and the duty of the advanced towards the backward races has come to be expressed as that of a trustee towards his *cestui que trust*, or of a guardian towards his ward.

The terms 'Trusteeship' and 'Wardship' are used in this connection to designate two different sets of duties.

In the first place, they are taken in a broad ethical sense to mean the duties which the advanced peoples collectively owe to backward races in general—the 'white man's burden,' or, as the Covenant of the League of Nations puts it in the 'Mandates' Article, 'a sacred trust of civilization.' It may, perhaps, be

Flotcher, *Indian Education*, pp. 23 sq.  
Lant: *Great Northwest*, II. 304.  
F.O. Handbook, No. 82, pp. 15 sq.  
Parlv. Papers: 1837, Vol. VII. (426), p. 5.

More recently, the general welfare and advancement of the natives has been aimed at.

'Trusteeship' or 'Wardship.'

See Ch. XXVI. above.

said that it is in pursuance of this duty, resting on the whole International Family, that the rules of International Law that we are to consider in this Section have been or are being evolved.

In the second place, the terms are used in a more definite sense to refer to the duties which a particular Power owes to the backward races under its immediate control. In this sense, the terms may be said to sum up the actual duties of a legal or quasi-legal character with which we shall deal in the following Chapters.

Conpland ;  
*Wilberforce*,  
p. 58.  
Hansard ;  
*ParlV.*  
*History*, 23,  
cols. 1814-7.

The first formulation of the duties of a Colonial Power in terms of trusteeship is said to have been made by Burke in his speech in the House of Commons on Fox's India Bill in 1783. 'All political power,' he said, 'which is set over men . . . ought to be some way or other exercised ultimately for their benefit. If this is true with regard to every species of political dominion, and every description of commercial privilege, none of which can be original self-derived rights, or grants for the mere private benefit of the holders, then such rights or privileges, or whatever else you chuse to call them, are all, in the strictest sense, a trust ; and it is of the very essence of every trust to be rendered accountable ; and even totally to cease, when it substantially varies from the purposes for which alone it could have a lawful existence.'

Snow :  
*Aborigines*,  
Ch. III.  
*Cherokee*  
*Nation v.*  
*Georgia* 5  
*Peters* at 17.  
*See also*  
*Worcester v.*  
*Georgia*  
6 *Peters* at  
557 & 557 ;  
and *U.S. v.*  
*Kagame*  
(1885), 118  
*U.S.* 375.

The rôle of the United States Government as the Guardian of the Indians in the United States was expressed in the early part of the nineteenth century and adopted by the Supreme Court in 1831. 'They' (the Indians), said Chief Justice Marshall, 'are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection ; rely upon its kindness and its power ; appeal to it for relief to their wants ; and address the president as their great father.'

The duties which trusteeship or guardianship entails have from time to time been accepted in various terms, and carried out in some directions, if not always in all, by the Colonial Powers. We shall, in this Chapter, notice some of the evidence going to show such general acceptance, and in the succeeding Chapters deal with special rules that have been or are being evolved for regulating certain of the duties.

#### *Acceptances of the duties of ' Trusteeship ' or ' Wardship .'*

**U.S. Govern-  
ment.**

From among the many pronouncements in which the duties have been accepted by the United States Government in regard

to the Indians in their country, it will be sufficient to quote from two Presidential Messages to Congress, one delivered on the 6th December, 1886, and the other on the 4th December, 1898. 'They [the Indians] are a portion of our people,' runs the earlier Message, 'are under the authority of our Government, and have a peculiar claim upon, and are entitled to, the fostering care and protection of the nation. The Government cannot relieve itself of this responsibility until they are so far trained and civilized as to be able wholly to manage and care for themselves.' 'The condition of the Indians,' said the President in the later Message, 'and their ultimate fate are subjects which are related to a sacred duty of the Government.'

77 S.P. 756.

85 S.P.  
1319.

Referring to the Philippines, President McKinley in his Message to Congress of the 3rd December, 1900, wrote :—

Baker :  
*Woodrow  
Wilson, etc.,*  
Ch. XV.

The fortunes of war have thrown upon this nation an unsought trust which should be unselfishly discharged and devolves upon this Government a moral as well as a material responsibility toward those millions we have freed from an oppressive yoke. . . . Our obligation as guardian was not lightly assumed.

And President Wilson, speaking on the 20th April, 1915, said :—

If we have been obliged by circumstances, or have considered ourselves to be obliged by circumstances in the past, to take territory which we otherwise would not have thought of taking, I believe I am right in saying that we have considered it our duty to administer that territory not for ourselves but for the people living in it, and to put this burden upon our consciences—not to think that this thing is ours for our use, but to regard ourselves as trustees of the great business for those to whom it does really belong.

'The system of criminal judicature which you adopt,' wrote the Board of Directors of the East India Company to the Government of India in transmitting to them the Government of India Act of 1858, 'must be formed with an especial regard to the advantage of the natives rather than of the new settlers, not because the latter are in themselves less worthy of consideration, but because they are comparatively few, and laws and institutions exist for the benefit not of the few, but of the many.'

India.  
Ilbert :  
*Govt. of  
India,*  
1st Edn.,  
p. 516.

'Through Fiji,' says a modern historian, 'England expressed a principle which was new in the Pacific, the principle, namely, that it was its first duty to protect and promote, neither religion, nor trade, nor colonization, but native institutions and native welfare.' This principle was kept in view when the Anglo-

England  
and France  
in the  
Pacific.  
Rogers,  
Ch. XV.

100 S.P.  
521.

French condominium was set up over the New Hebrides in 1906, each Power instructing its High Commissioner to use the best means at his disposal 'to raise gradually the level of moral and material prosperity among the natives.'

*The Berlin Conference.*

At the Berlin Conference, the duty of improving the condition of the African natives and raising them in the scale of civilization was put upon the same level as that of protecting them against the ravages of the slave trade and the evils of slavery.

C.-4361  
(1885),  
p. 9 sq.

'In convoking the Conference,' said Prince Bismarck in his opening speech, 'the Imperial Government was guided by the conviction that all the Governments invited share the wish to bring the natives of Africa within the pale of civilization by opening up the interior of that continent to commerce, by giving its inhabitants the means of instructing themselves, by encouraging missions and enterprises calculated to spread useful knowledge, and by preparing the way for the suppression of slavery.'

*Ib.* p. 11.

'I must not,' observed the British representative, 'lose sight of the fact that, in the opinion of Her Majesty's Government, commercial interests should not be looked upon as the exclusive subject of the deliberations of the Conference.'

'While the opening of the Congo markets is to be desired, the welfare of the natives should not be neglected; to them it would be no benefit, but the reverse, if freedom of commerce, unchecked by reasonable control, should degenerate into licence. I venture to hope that this will be borne in mind, and that such precautions will be adopted for the regulation of legitimate commerce as may tend to insure, as far as possible, that its introduction will confer the advantages of civilization on the natives, and extinguish such evils as the internal Slave Trade, by which their progress is at present retarded.'

'I cannot forget that the natives are not represented amongst us, and that the decisions of the Conference will, nevertheless, have an extreme importance for them. The principle which will command the sympathy and support of Her Majesty's Government will be that of the advancement of legitimate commerce, with security for the equality of treatment of all nations, and for the well-being of the native races.'

Similar sentiments were expressed by the representatives of Portugal and Italy, and seem to have been generally acquiesced in.

That these objects had been kept in view throughout the Conference was insisted upon at the final sitting. 'We have neglected nothing in the bounds of possibility,' said the Italian plenipotentiary, 'for opening as far as the centre of the African Continent a wide route to the moral and material progress of the native tribes.'

C.-4361  
(1885),  
p. 301.

These principles took form in Article 6 of the General Act of the Conference, which deserves to be quoted hero in full. It reads as follows :—

The Berlin  
Act.  
C.-4361  
(1885).  
C.-4739  
(1886).

All the Powers exercising sovereign rights or influence in the aforesaid territories [the conventional basin of the Congo] bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery, and especially the Slave Trade. They shall, without distinction of creed or nation, protect and favour all religious, scientific or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization.

Christian missionaries, scientists, and explorers, with their followers, property, and collections, shall likewise be the objects of especial protection.

Freedom of conscience and religious toleration are expressly guaranteed to the natives, no less than to subjects and to foreigners. The free and public exercise of all forms of Divine worship, and the right to build edifices for religious purposes, and to organize religious Missions belonging to all creeds, shall not be limited or fettered in any way whatsoever.

The Commission reporting upon this Article to the full Conference observed that :—

C.-4361  
(1885), 65.

La nécessité d'assurer la conservation des indigènes, le devoir de les aider à atteindre un état politique et social plus élevé, l'obligation de les instruire et de les initier aux avantages de la civilisation, sont unanimement reconnus.

C'est l'avenir même de l'Afrique qui est ici en cause : aucun dissentiment ne s'est manifesté et n'a pu se manifester à cet égard dans la Commission.

### *The Brussels Act.*

The Brussels Act, too, while it was mainly concerned with the protection of the natives from slave raiders and dealers, did not omit provisions dealing in a positive manner with their moral and material advancement. Among the subsidiary

C.-5557  
(1892).

duties to be performed by the inland stations were the following (Article 2) :—

To initiate them [the natives] in agricultural works and in the industrial arts so as to increase their welfare ; to raise them to civilization and bring about the extinction of barbarous customs, such as cannibalism and human sacrifices. . . .

To protect, without distinction of creed, the Missions which are already or may hereafter be established.

*The Convention of St. Germain.*

That the abrogation of the Berlin and Brussels Acts, as between the Powers who have ratified or may ratify the Convention of St. Germain-en-Laye of 1919, did not denote any repudiation on the part of those Powers of the duties they had undertaken towards the natives, is sufficiently shown by Article 11 of the Convention, which in substance re-enacts the provisions of Article 6 of the Berlin Act, but extends them to all the African territories of the Powers concerned. That Article is worded as follows :—

Omd. 477  
(1919).

The Signatory Powers exercising sovereign rights or authority in African territories will continue to watch over the preservation of the native populations and to supervise the improvement of the conditions of their moral and material well-being. They will, in particular, endeavour to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea.

They will protect and favour, without distinction of nationality or of religion, the religious, scientific or charitable institutions and undertakings created and organised by the nationals of the other Signatory Powers and of States, Members of the League of Nations, which may adhere to the present Convention, which aim at leading the natives in the path of progress and civilisation. Scientific missions, their property and their collections, shall likewise be the objects of special solicitude.

Freedom of conscience and the free exercise of all forms of religion are expressly guaranteed to all nationals of the Signatory Powers and to those under the jurisdiction of States, Members of the League of Nations, which may become parties to the present Convention. Similarly, missionaries shall have the right to enter into, and to travel and reside in, African territory with a view to prosecuting their calling.

The application of the provisions of the two preceding paragraphs shall be subject only to such restrictions as may be necessary for the maintenance of public security and order, or as may result from the enforcement of the constitutional law of any of the Powers exercising authority in African territories.

*Great Britain and Africa.*

The acceptance of the doctrine of trusteeship in the statement of the British Government in 1923 regarding the immigration of Indians into Kenya is in no halting or uncertain terms. The statement runs as follows :—

Primarily, Kenya is an African territory, and His Majesty's Government think it necessary definitely to record their considered opinion that the interests of the African natives must be paramount, and that if, and when, those interests and the interests of the immigrant races should conflict, the former should prevail. . . . In the administration of Kenya His Majesty's Government regard themselves as exercising a trust on behalf of the African population, and they are unable to delegate or share this trust, the object of which may be defined as the protection and advancement of the native races. . . . There can be no room for doubt that it is the mission of Great Britain to work continuously for the training and education of the Africans towards a higher intellectual, moral and economic level than that which they had reached when the Crown assumed the responsibility for the administration of this territory.

Cmd. 1922  
(1923).  
*See also*  
*The Times*,  
4 Oct. and  
26 Nov.,  
1923; &  
E. Africa  
Commis-  
sion's  
Report,  
Cmd. 2387  
(1925).

Referring to the same question in the House of Commons on the 25th July, 1923, the Under-Secretary of State for the Colonies made use of the following language :—

We are the trustees of many great African Dependencies, of which Kenya is one, and our duty is to do justice and right between the various races and interests, remembering, above all, that we are the trustees before the world for the African population. Our administration of this trust must stand eventually before the judgment seat of history, and on it we shall be judged as an Empire.

Parly.  
Reports  
167, H.O.  
Debates,  
col. 508.

*The Covenant of the League of Nations.*

The most authoritative statement which accepts in terms the duties of trusteeship is that contained in the Mandates Article of the Covenant of the League of Nations :—

Art. 22.

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

As we saw in Chapter XXVI, the Mandatory Power is to give an annual report on the territory committed to its charge to the Council of the League, so that the whole of the League is concerned to see that the Mandatory Power properly carries out the trust.

*'Trusteeship' widely accepted.*

Cmd. 151.  
(1919), p. 18.

Cmd.  
1922 (1923).

The League of Nations mandatory system applies only to the backward territories which were taken from Germany and Turkey as the result of the Great War. The duty of securing 'just treatment of the native inhabitants of territories under their control' is, however, enshrined in Article 23 of the Covenant, so that it has been accepted by all the States who are Members of the League; and, as was stated in the Commentary on the Covenant as presented to the British Parliament, 'the mandatory principle may prove to be capable of wide application.' That the duties of trusteeship are no less imperative in non-mandated than in mandated backward territory for a colonial Power that wishes its actions to be judged by modern standards follows from the evidence marshalled in this Chapter. The point was directly made in the British Government's memorandum on Kenya from which we have already quoted. 'His Majesty's Government,' continues the statement, 'desire also to record that in their opinion the annexation of the East Africa Protectorate, which, with the exception of the mainland dominions of the Sultan of Zanzibar, has thus become a Colony, known as Kenya Colony, in no way derogates from this fundamental conception of the duty of the Government to the native races. As in the Uganda Protectorate, so in the Kenya Colony, the principle of trusteeship for the natives, no less than in the mandated territory of Tanganyika, is unassailable.'

## CHAPTER XXXVII.

### NATIVE PROPERTY.

SOVEREIGNTY and property being distinct and different entities, there is no necessary reason why circumstances that affect the one should have any influence upon the other.

As regards protectorates, it is clear that the transfer of the external sovereignty only does not entitle the protecting Power to deal with the property within the protected territory. In some cases, a statement to this effect has been included in the treaty of protection; but this should not be necessary, and any rights which the protecting Power possesses in regard to property must be based upon, and limited by, agreement with the local authority.

In protectorates.  
*In re S. Rhodesia*,  
1919 A.C. 241.  
Girault, II, IX.  
*E.g.* 75 S.P.  
553 & 810.

Coming to cases where the full sovereignty passes, it may first be noted that, among the ancients, with whom Conquest was the recognized mode of extending sovereignty, the accepted principle was that conquered peoples were left without rights of any sort. The well-known rule of Roman Law was that the moveables of an enemy were *res nullius*; and the land taken in war was considered to be the property of the Roman State, although in some cases the previous owner of the land was allowed to retain a small portion of it *honoris causa*.

In ancient times  
property  
passed  
with sove-  
reignty by  
Conquest.

The generally accepted modern rule, however, is that, whatever the degree of development of the territory concerned, privately owned property within a region which has been acquired by Conquest or Cession remains unaffected by the transfer of the sovereignty unless and until the new sovereign brings about some alteration in its condition by means of his municipal law. In the case of relatively advanced territory, the property affected comprises not only land and movables,

The  
modern  
rule where  
the full  
sove-  
reignty is  
acquired.  
¶

\* Numbers XXXIII. vv. 53 *eg.* Dent. III. vv. 6 *eg.* Walker, §§ 21, 22, 25 & 31. Just. Inst. II. I. 17. Sandars: Just., 97. Grotius, III. VI. XI. (2).

¶ Award of His Britannic Majesty *re* the Alsop claim, 104 S.P. 855. *Johnson v. McIntosh*, 8 Wheat. Reps. at 539. *Mitchel & others v. The U.S.* 9 Peters' Reps. at 734. *Cook v. Sprigg*, 1899 A.C. 572. *Transvaal Concessions Report*, 1901, Cd. 623, p. 7.

but contracts and other incorporeal property. In the case of backward territory, the form of property that comes into question is usually only land. But the land is held and utilized under a variety of conditions. At the one extreme, it may be occupied merely by hunting or nomadic tribes; at the other, it may be cultivated by settled communities under a system of individual proprietorship. In this Chapter we shall consider whether, and to what extent, it can be said that the rights of a sovereign to deal with the land in his newly acquired backward territory are regulated by usage.

### Communally-held lands.

The proprietary rights of the American Indians were at first largely ignored; Maine: *Int. Law* Lect. IV. (73 & 74). but gradually came to be recognized. Walker, § 123.

Story: *Commentaries*, §§ 85 & 86.  
Kent: *Commentaries*, iii. 392.  
Jones and others: *Quakers in America*, Bk. V., Ch. VI.  
Assembly of Virginia. Fletcher; *Indian Education*

During the earliest period of the colonization of the New World, the proprietary and sovereign rights of the native tribes were rarely distinguished. Conquest was usually held to extinguish both. The continent was vast and sparsely populated; the settlers gradually drove the aborigines before them farther into the interior and took their hunting-grounds, which had been tribal property, for themselves at the same time that they secured the sovereignty over them for the Crown.

Among the publicists of the time there were not wanting both those who defended and those who condemned this treatment of the natives. Victoria and others argued in favour of the private as well as the public rights of the natives; and before the first half of the seventeenth century had passed, instances occurred in which the proprietary rights of the Indians were respected by the settlers.

The Puritans who settled New Plymouth and New Haven purchased their lands of the Indians. The island of Aquednok and the Providence Plantations were acquired in the same way by fugitives from religious persecution in Massachusetts. The Massachusetts legislature in 1633 declared that the Indians should be protected in the enjoyment of their improved lands, hunting-grounds and fishing-places. The Swedes on the Delaware, and the Dutch and after them the English in New York, always respected Indian titles to land.

In March 1656, during a period of peace with the Indians, the Assembly of Virginia enacted that

What lands the Indians shall be possessed of by order of this or other ensuing Assemblies, such land shall not be alienable by them the Indians to any man de futuro, for this will putt vs to a

continual necessity of allotting them new lands and possessions and they will be allwaies in feare of what they hold not being able to distinguish between our desires to buy or inforcement to have, in case there grants and sales be desired.

*and  
Civilization,  
p. 28.*

The remarkable treaty made with the Indians by William Penn in 1681, when he paid them for the land he required notwithstanding that he had previously been constituted 'full and absolute proprietor' of it by the English Crown, has earned him universal and well-deserved honour. The success which attended this method of dealing with the Indians showed that it was also good policy, and its significance was not lost on the other colonists.

*William  
Penn.  
Clarkson  
Wm. Penn,  
Ch. XVII.  
& XVIII.  
Jones and  
others  
op. cit.,  
Bk. V.,  
Ch. VI.*

The laws in force in the British provinces before the Treaty of Peace of 1763 have been described by the Supreme Court of the United States in the following terms :—

*British  
North  
American  
laws and  
the  
Indians'  
right of  
'possession.'  
Mitchel  
and others  
v. The U.S.  
(1823), 9  
Peters,  
Reps. at  
746.*

One uniform rule seems to have prevailed from their first settlement, as appears by their laws ; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.

Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.

Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws ; but such purchases were valid with such license, or in conformity with the local laws ; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete.

Indian possession or occupation was considered with reference to their habits and modes of life ; their hunting grounds were as much in their actual possession as the cleared fields of the whites ; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their right became extinct, the lands could be granted disincumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. Such was the tenure of Indian lands by the laws of Massachusetts ; in Connecticut ; Rhode Island ; New Hampshire ; New York ; New Jersey ; Penn-

sylvania; Maryland; Virginia; North Carolina; South Carolina; Georgia; by congress; by their respective laws, and the decisions of courts in their construction.

Vattel, I. § 209.  
Phillimore,  
I. § CXXLV.  
Maine: *Int. Law*,  
Lect. IV. (74)  
Kent: *Commentaries* III. 386.  
Sidgwick:  
*Politics*,  
XV. § 4; &  
XVIII. § 8.  
Lucas, p. 28.  
Jones: *op. cit.*  
Bk. IV., Ch. IV.

*The utilitarian theory of ownership and the Reservation System.*

The opinion was, however, generally held that where tribes or communities were occupying an inordinately large extent of land merely for hunting, or even for pasturing flocks and herds, there was no just reason why some part of it should not be taken and put to more productive uses. But it came to be recognized that sufficient land ought to be left to the original occupants for their sustenance, and there arose the policy of reserving definite areas for their exclusive use.

See Report  
of House of  
Commons'  
Committee  
on  
*Aborigines*,  
1837,  
Vol. VII.  
(426), p. 4.

The reservation system has since been extensively adopted; and although it cannot be said that the natives have always been fairly dealt with, the duty of allowing hunting and nomadic tribes to retain a sufficient quantity of the lands from which they draw their subsistence has been increasingly acknowledged by the States that have acquired dominion over them. The duty of compensating them for the land taken for white settlement, by supplying them with the means and equipment for a more settled mode of existence, has also in some cases been recognized. Moreover, steps have been taken to prevent their reserved lands from being reduced by improvidence on the part of the natives or by violence and cunning on the part of settlers.

*Canada.*

*Ann. Reg.*,  
1768,  
pp. 211-2.  
*Mitchel v.*  
*U.S.*,  
9 Peters at  
747 sq.

By the Royal Proclamation of the 7th October, 1763, certain portions of the territory in North America which was ceded to Great Britain by the Treaty of Paris were reserved exclusively to the Indians as their hunting-grounds. To protect the Indians from fraud in connection with the purchase of their lands, it was provided that no land should be purchased from them by private persons, but that, if they should be inclined to sell, purchases might be made for the Crown at some public assembly of the Indians to be held for that purpose by the Governor or Commander-in-Chief of the colony within which they were situated.

*St.*  
*Catherines's*  
*Milling*,  
*etc., Co. v.*  
*The Queen*,  
14 A.C. 46.

The Judicial Committee of the Privy Council (in 1888) held that, under this Proclamation, 'the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign,' and that there had been 'all along vested in

the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.'

Considerations regarding the precise nature of the Indian title are, however, of interest mainly from the point of view of the municipal law; International Law is concerned rather with the broad question whether substantial justice has been done to the natives when their hunting-grounds have been taken for settlement and cultivation. And on this point it is to be observed that lands which it has been desired to settle have been acquired by the Crown from the Canadian Indians by treaties of cession in accordance with the Proclamation of 1763. These treaties have provided for the reservation of tracts of land for the exclusive use of the Indians and varying in extent according to the number of their families, for the payment to them of annuities, for the gift of implements and other presents, and for the maintenance of schools in the reservations.

Form, cf. substance, of rights allowed to natives.

See e.g. *Dominion of Canada v. Province of Ontario*, 1910 A.C. 837. 87 S.P. 1180 sq.

### *The United States.*

In the United States, the Indians' reserves have been exchanged and continually reduced in area, but such changes have formed the subject-matter of treaties or arrangements between the United States Government and the various tribes, and when territory has been taken for white settlement, means have been adopted to ensure that the native inhabitants have been given compensation sufficient to provide them with the means of subsistence on the restricted lands. In some cases agricultural implements and seeds have been supplied to them; and they have been provided with teachers and otherwise assisted to adopt a more settled and civilized life.

*Cherokee Nation v. Georgia* (1831), 5 Peters, at 16. 87 S.P. 773 & 1036 sq. 88 S.P. 409 sq. Woolsey, § 63. Kent: *Comm.*, iii., 384 to 399. Maine: *Int. Law*, Lect. IV. (74). Snow, Ch. VI.

The principle acted upon by the United States Supreme Court has been that the natives possess a right to the occupancy of their reserved lands, subject to the exclusive right of the United States Government 'of purchasing such lands as the natives were willing to sell.' When the State of Georgia by statute purported to take the lands that had been pledged to the Cherokee nation by treaties with the United States Government, those statutes were declared to be null and void by the Supreme Court as being repugnant to the constitution, treaties, and laws of the United States.

*The Indians' right of occupancy.* *Cherokee Nation v. Georgia*, 5 Peters at 17. *Michel v. U.S.*, 9 Peters 748. Kent: *Comm.*, vii., 383-4 & 399. *Worcester v. Georgia* 6 Peters, 515.

The Committee of the House of Representatives who were appointed to consider the proposal for the removal of the Southern

21st Cong.  
1st Session,  
H. of R.  
Rep.,  
No. 227, p. 8.

Form, of  
substance,  
of legisla-  
tion affect-  
ing native  
property.

*Am. & Eng.  
Enc. of Law,  
Vol. 16.  
Tit.:  
Indians.*

Recent  
Policy  
of U.S.  
*re Eff*  
(1905), 197  
U.S., 488.  
95 S.P.  
746.

Indians to reservations west of the Mississippi, in their Report of the 24th February, 1880, laid down that the treaties made with the Indians were 'but a form of government, and a substitute for ordinary legislation, which were from time to time dispensed with, in regard to those tribes which continued in any of the colonies or States until they became enclosed by the white population.' This appears clearly to be the correct view as regards treaties made with tribes after their territory has passed entirely under the sovereignty of the dominant Power. Such a Power, as we have noticed, can deal with private property within the acquired territory by means of its municipal law; and International Law is not concerned with the particular form which the sovereign may see fit to cause such legislation to take, but only with the effects of the legislation on the rights which the natives have previously enjoyed. The making of treaties between the United States and the Indians within their territory has, in fact, been put an end to by the Act of the 3rd March, 1871, and Indian affairs have since been regulated by Acts of Congress and by contracts. But the Indians' right of occupancy remains inextinguishable without their voluntary consent.

The policy of the United States, as evidenced in particular by the Act of Congress of 1887 'for the allotment of lands in severalty to Indians on the various reservations,' &c., is now directed towards the breaking up of tribal relations, reserved lands being allotted in suitable cases to the members of a tribe in individual proprietorship, with a view to the proprietors being admitted to all the rights and obligations of United States citizenship.

### *Southern Rhodesia.*

*In re S.  
Rhodesia,  
1919 A.C.  
at 214.*

*Id.* at 223.  
86 S.P.  
114 sq.

In Matabeleland and Mashonaland (now Southern Rhodesia), where the tribes 'had passed beyond the purely nomad stage, though still remaining fluid,' the policy of reserving certain areas for the natives was also adopted. The Matabele Order in Council of the 18th July, 1894, constituted a Land Commission for Matabeleland, by whom land was to be assigned to the natives 'sufficient for their occupation, whether as tribes or portions of tribes, and suitable for their agricultural and pastoral requirements, including in all cases a fair and equitable proportion of springs or permanent water.' The Commission was also to direct the Administration to deliver to them cattle sufficient for their needs. It was further provided that, if the British

South Africa Company should require any of the assigned land 'for the purpose of mineral development or as sites of townships, or for railways or other public works,' the Land Commission, upon good and sufficient cause shown and after full enquiry, might order the natives to remove from such land, and the Commission were then to assign to the natives affected 'just and liberal compensation in land elsewhere situate in as convenient a position as possible, . . . and, as far as possible, equally suitable for their requirements in all respects as the land from which they are ordered to remove.'

In 1914, the Southern Rhodesia Native Reserves Commission were appointed 'to examine the said Native Reserves, having special regard to the sufficiency of land suitable for the agricultural and pastoral requirements of the natives including in all cases a fair and equitable proportion of springs or permanent water, and bearing in mind not only their present requirements but their probable future necessities consequent on the spread of white settlement to areas not within the Reserves and the growth of the native population, and subject to such alterations by increase or diminution of reserves as they the said Commissioners might think desirable, to make recommendations in order that the said Reserves should be finally assigned and demarcated.' The lands assigned to the natives in accordance with the recommendations of the Commission were, by the Order in Council of the 9th November, 1920, vested in the High Commissioner for South Africa, 'and set apart for the sole and exclusive use and occupation of the native inhabitants of Southern Rhodesia,' and no such lands were to be alienated by the High Commissioner except for certain very limited purposes and then only in exchange for other land.

Cmd. 1042  
(1920).

### *Lands held by agriculturalists.*

In cases where communally owned lands have been inhabited by a more advanced and agricultural population, the principles of assuring to the natives an adequate supply of land, and of preventing them from being deprived of their land by violent or overreaching settlers, have also been recognized and have been applied through different methods. The point that the methods adopted must vary with the conditions of the aboriginal inhabitants was well brought out by the British Colonial Secretary in his despatch to the Governor of New Zealand of the 18th August, 1844 :—

**Land policy dependent upon the condition of the natives.**

Parli.  
Papers,  
1846, Vol.  
XXXIII.  
(1).

. . . : There are many gradations of 'uncivilized inhabitants,' and practically, according to their state of civilization, must be the extent of rights which they can be allowed to claim, whenever the territory on which they reside is occupied by civilized communities. And it cannot be denied that, among 'uncivilized nations,' the New Zealanders hold a very high place, certainly far above the inhabitants of the other Australian Colonies.

The aborigines of New Holland generally are broken into feeble and perfectly savage migratory tribes, roaming over boundless extents of country, subsisting from day to day on the precarious products of the chase, wholly ignorant of or averse to the cultivation of the soil, with no principles of civil government, or recognition of private property, and little, if any, knowledge of the simplest forms of religion, or even of the existence of a Supreme Being. It is impossible to admit, on the part of a population thus situated, any rights in the soil which should be permitted to interfere with the subjugation by Europeans of the vast wilderness over which they are scattered; and all that can be required by justice, sanctioned by policy, or recommended by humanity, is to endeavour, as civilization and cultivation extend, to embrace the aborigines within their pale, to diffuse religious knowledge among them, to induce them, if possible, to adopt more settled modes of providing for their subsistence, and to afford them the means of doing so, if so disposed, by an adequate reservation of lands within the limits of cultivation. But the position of the New Zealanders of the Northern Island, at the time of its occupation by Great Britain, was the reverse of all this. Comparatively speaking, their territory was not of vast extent, though unquestionably far more than sufficient, under any circumstances, for the actual population. Their main, though not their sole subsistence, was derived from agriculture, rude, indeed, but continuous: rights of property, as between tribe and tribe, and of individuals of each tribe *inter se*, were recognized and well understood. . . .

I cannot think that it would be either just or practicable to apply the same rule, with regard to the occupation of land, to classes of aborigines so widely differing from each other.

#### *New Zealand.*

When New Zealand was annexed by Great Britain in 1840, the Government showed the greatest solicitude for the proprietary rights of the Maoris. In the instructions which the Secretary for War and Colonies sent to the British representative in New Zealand in August 1839, the principles to be observed in acquiring land were stated as follows:—

It will be your duty to obtain, by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may

be progressively required for the occupation of settlers resorting to New Zealand. . . . All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all: they must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves.

Parly.  
Papers,  
1840, Vol.  
XXXIII.  
(238), p. 39.

In accordance with these principles, and with the recommendations of the Select Committee of the House of Commons of 1840, the Treaty of Waitangi, by which the various Maori chiefs ceded the sovereignty over North Island to Great Britain, confirmed and guaranteed 'to the chiefs and tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess,' subject to Her Majesty's 'exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty.'

Parly.  
Papers,  
1840, Vols.  
VII. (532)  
and  
XXXIII.  
(560).  
The Treaty  
of Waitangi.  
6 Hertslet,  
580.

These provisions have been upheld by the British Government in spite of endeavours made by individual settlers and by the New Zealand Company to establish claims to large tracts of land on the ground of direct purchase from the natives. Claimants who based their title upon purchases alleged to have been made before the British annexation, or during one of the periods when the Crown's right of pre-emption was waived by the Governor, have been required to show that the transaction could be justified by considerations of 'real justice and good conscience'—the House of Commons Committee of 1840 reported that large tracts had been acquired by settlers for nominal considerations, such as a blanket, a hatchet, or a gun. The condemnation of the provisions of the Treaty, and particularly of the recognition of a native title to unoccupied as well as occupied lands, made by the Committee of the House of Commons in 1844 in the interests of the New Zealand Company, was not endorsed by the House of Commons itself or by the British

See e.g. 18 &  
18 Vict. c. 72,  
s. 73.  
Hight & Bam-  
ford, Chs. XV.  
& XVI.  
Jenks,  
Chs. VIII.  
IX. & XIII.  
Parly. Papers;  
1841, Vol. XVII  
(311) p. 54.  
1840, Vol.  
VII (582).

1844, Vol.  
XIII. (560).

Parlv. Papers,  
1846, Vol.  
XXXIII.

(1).

*Nireaha  
Tamaki v.  
Baker*, 1901,  
A.C. 561.

*Te Tera Te  
Paea v. Te Roera  
Torsha*,  
1902, A.C. 56.

*Manu  
Kapua v.  
Para  
Hamona*,  
1913, A.C.  
761.

*Hight &  
Bamford*,  
pp. 6 & 263.

Government of the day; and the attempt made by a later Colonial Secretary to deprive the Maoris of the waste lands without compensation was frustrated by the protests raised against any such violation of the Treaty of Waitangi. The title of the natives to the possession and occupancy of their lands has been recognized by the Judicial Committee of the Privy Council on appeals from the Court of Appeal of New Zealand. The Crown's sole right to purchase native lands has been enforced. Only the lands of rebellious natives have been forfeited without compensation.

The troubles which have arisen with the Maoris regarding their lands appear to have been due not, as has been suggested, to the provisions of the Treaty of Waitangi, but rather to action that has been contrary to those provisions or to their spirit. Such action has been taken, in some cases, owing to inadequate appreciation of the fact that, according to Maori custom, an individual occupant has no power to give a full title to land, which properly belongs to the tribe; in other cases it has been due to attempts to take advantage of the natives. The authors of a modern work on 'The Constitutional History and Law of New Zealand' consider that 'there is sufficient evidence to prove that, at the time of the first occupation by British subjects, every part of the country was owned, according to the established native custom, by one tribe or another'; and that 'if native rights to the ownership of land had been admitted only when arising from occupation,' a fierce war of conquest would have been the result.

### *Fiji.*

A similar care for the rights of the natives to their lands was displayed by the British Government in connection with Fiji. The Instrument of Cession of the 10th October, 1874, by which the islands were transferred to the British Crown, vested the proprietorship of all lands in the Crown, except such as had become *bona fide* the property of Europeans or other foreigners, or were in the actual use or occupation of some chief or tribe, or required for the probable future support and maintenance of some chief or tribe. The Land Commission subsequently appointed to consider claims to land, found that the whole of the land in Fiji had been owned by the various tribes; and lands to which foreigners could not establish a *bona fide* claim were restored to the tribes.

G.-1114  
(1875).

G.-3584  
(1883),  
p. 66.

*Lagos.*

As a last example drawn from British practice, we may refer to the case of certain communally-owned lands that were held by a White Cap Chief in Lagos. The Island had been ceded to the British Crown in 1861 by the then king, with all the rights, profits, territories and appurtenances thereto belonging, and the question of the nature of the native title to land came before the Judicial Committee of the Privy Council in 1921. Their Lordships found that, while the radical title to the land was in the Crown, the full usufructuary title vested in the chief on behalf of the community of which he was the head, and that, when certain lands were taken by the Government of the colony, for public purposes, compensation was payable on the basis that the chief, on behalf of his community, was transferring the land to the Governor in full ownership, excepting in so far as the land was unoccupied. 'No doubt,' runs the Judgment, 'there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place.' 'A mere change in sovereignty,' added their Lordships, 'is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are *prima facie* to be construed accordingly.'

*Amodu Tijani v. Secretary, Southern Nigeria, 1921, 2 A.C. 899.*

*The Judicial Committee and native property.*

*Examples from the practice of other Powers.*

By other colonizing Powers, too, the duty of securing to the native tribes or communities under their control an adequate supply of land for their subsistence has been recognized in principle in divers ways and carried out in practice to varying extents. A few out of the many examples that might be mentioned will suffice.

In Java, where there exists a mixed system of communal and individual rights to land, the Government claim the property in the soil, but recognize the native rights of possession. Native occupants may not sell their land, although they may let it under certain conditions; and care is taken to protect native holders against unscrupulous non-native speculators.

The Portuguese Law of the 9th May, 1901, regulating the concession of lands in the Portuguese colonies, recognizes the

*Dutch East Indies. Inst. Col. Ind.; Le Régime foncier, etc., Vol. IV. F.O. Handbook, No. 82, p. 64.*

Portuguese  
Colonies.  
107 S.P.  
1099.

83 S.P. 398.

Italian  
Eritrea.  
Inst. Col.  
Int. op.  
cit. Vol. III.  
German  
Samoa  
and East and  
South-west  
Africa.  
F.O. Hand-  
book, No.  
148, p. 60;  
No 113,  
p. 78; No.  
112, p. 42.

French  
Equatorial  
Africa.  
F.O. Hand-  
book,  
No. 108,  
pp. 24 & 49.

right of the natives to the proprietorship of lands habitually cultivated by them which may be within the sphere of the concessions, and provides for the reservation of lands 'for dwellings and agricultural labour for those who there reside and do not engage in culture.' The Mozambique Company was required by its charter (1891) to 'allow the natives to keep the lands required for the cultivation of articles of food for their subsistence.'

In Eritrea, the Italians have recognized the communal property of the natives, and have rendered their reserves inalienable.

In Samoa, the Germans reserved land for the natives at an average of three acres a head; and the natives were not allowed to sell, let, or mortgage any land without the sanction of the Governor. In German East Africa (now the Tanganyika territory) it was officially declared that the natives were to be allowed at least four times as much land as they cultivated. In German South-west Africa, however, the native claims to land were overridden, even by Ordinance.

In French Equatorial Africa, not only the cultivated land, but also the pasture and forest land surrounding a village, are now included in the native reserves. At one time, the land (in what was then the French Congo) was held by concessionaire companies who had been given the sole rights to the natural products—a condition of affairs which led to serious abuses, and called forth protests from the British Government on behalf of the British firms who had previously traded directly with the natives in the rubber and other forest products.

### *Belgian Congo.*

Natives  
deprived of  
their lands.  
Cd. 1899  
(1903).

One of the charges brought against the Administration of the Congo State was formulated by the British Government in the following terms:—

With the exception of a relatively small area on the lower Congo, and with the further exception of the small plots actually occupied by the huts and cultivation patches of the natives, the whole territory is claimed as the private property either of the State or of holders of land concessions. Within these regions the State or, as the case may be, the concession-holder alone may trade in the natural produce of the soil. The fruits gathered by the natives are accounted the property of the State, or of the concession-holder, and may not be acquired by others. In such circumstances, His Majesty's Government are unable to see that there exists the complete freedom of trade or absence of monopoly in trade which is

required by the Berlin Act. On the contrary, no one other than the agents of the State or of the concession-holder has the opportunity to enter into trade relations with the natives; or if he does succeed in reaching the natives, he finds that the only material which the natives can give in exchange for his trade goods or his money are claimed as having been the property of the State or of the concession-holder from the moment it was gathered by the native.

These charges were substantiated by the Report of the Commission of Inquiry which the Congo Government set up, and that Government recognized the untenability of their position by issuing, in June 1906, a Decree, which the British Minister in Brussels summarized as follows :—

Ca. 3002  
(1906).

The *Native Lands Decree* . . . declares to be native lands all lands inhabited, cultivated, or developed, in what manner soever, by natives, in conformity with local usage and custom. These lands are to be marked out, and the Governor-General or local authority may grant to each village an area three times the size of that actually inhabited and cultivated by the villagers, or even of greater extent. Natives may not alienate land so bestowed on them without the authority of the Government. They are to receive seeds gratuitously from Government; they may cut wood, fish, and hunt in lands other than their own, subject to existing regulations respecting the destruction of forests, wild beasts, and specially elephants.

Ca. 3450  
(1907), p. 2.  
Native  
lands  
restored.

Great Britain considered, however, that having regard to the conditions existing, these provisions were inadequate to enable the natives to trade in the natural products of their country, and urged that the natives should be free to trade in all the natural products of the soil, and to cultivate land for their own use, within the limits of the old tribal boundaries. The Belgian Decree of the 22nd March, 1910, gave effect to this view to the extent of abolishing the State monopoly of the vegetable produce of the domain lands, with the exception of lands cultivated by the Administration and certain forest reserves, thereby recognizing the right of the natives to gather the vegetable products of domainial, i.e. vacant, lands for their own benefit. Further, the Belgian Government, while maintaining that, in accordance with a universally recognized rule, all vacant lands had become the property of the State, undertook that, 'if groups of natives asked for domainial lands with the object of undertaking cultivation for profit, such lands should be granted to them without payment, on condition that they were exploited within a period of time to be fixed by the local authorities in

Ca. 4396  
(1908).

103 S.P.  
531.  
104 S.P.  
786.  
107 S.P.  
361.  
Cd. 6559  
(1911).  
Cd. 6606  
(1913), pp.  
38-48 & 88.

agreement with the natives.' Lands so granted 'would then form part of those occupied by the natives, and would be subject to the customs of the tribe, and the natives would enjoy, as regards these lands, the same guarantees as those which protected the lands now under native cultivation.'

*Conclusions as to communally-held Lands.*

It is improbable that to-day any colonial Power would dispute the proposition that native tribes under its sovereignty, who have held lands in common or collective ownership, are entitled to be secured in the possession of a sufficient quantity of land to enable them to obtain an adequate subsistence in the circumstances of their condition as modified by the presence of a white population. The difficulties which arise are in the application of the principle to the varied conditions which are met with in practice, and particularly in the determination of the practical question as to how much land ought, in a given case, to be left to native tribes, and how much should be made available for non-native settlement or exploitation. It is, moreover, unfortunately the case that regulations which in their terms appear to do justice to the natives are sometimes administered in such a way as to defeat that end, and there is clearly a duty cast upon those Powers who subscribe to the principle in question to see that just legislation results in fair and tolerable conditions in the lives of the natives.

*Individual Property among Natives.*

And if the proprietary rights of the natives ought to be recognized in the case of land belonging to the native community as a whole, *a fortiori* effect should be given to such individual rights of property as were valid by the native laws or customs prior to the advent of the new sovereign. In practice, this has generally been done. 'Some tribes,' said the Judicial Committee of the Privy Council in the case of the Southern Rhodesian lands, 'are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. . . . On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.'

1919, A. C.  
at 233.

## Private acquisition of Land from the Natives.

We have already noticed a number of cases in which it has been considered necessary to protect native holders or occupants of land from fraudulent or unscrupulous purchasers. The regulation of purchases from the natives is also sometimes desirable in the interests of non-natives, who might, for instance, assume that a native occupant had the right to dispose of land which properly belonged to his tribe; or in order to prevent undesirable immigration into native territory.

*E.g. Cd. 6802, p. 36 (Belgian Congo).*

It is not enough to declare that the ultimate title to the land is in the Government, if the native possessors or occupants are free to dispose of their interest in the land; and a common practice, of which a number of instances have been mentioned, is for the Government to reserve to itself the sole right of purchasing land from the natives. A settler can then acquire native-held land only if the Government is willing to purchase it for him and on the Government's conditions. In some cases, the alienation of native land, or of certain kinds of, or interests in, native land, has been entirely prohibited.

*E.g. F.O. Hand-books, Nos. 144 (Brit. Oceania) & 146 (German Oceania).*

In other cases, settlers have been allowed to deal direct with the natives, but their purchases have been invalid unless approved by a government functionary or by the Court. For example, in certain Orders in Council relating to different parts of Rhodesia it is provided that 'no contract for encumbering or alienating land the property of a native shall be valid unless the contract is made in the presence of a Magistrate, is attested by him, and bears a certificate signed by him stating that the consideration for the contract is fair and reasonable, and that he has satisfied himself that the native understands the transaction.'

*E.g. F.O. Hand-books, Nos. 80 (Portuguese Timor), 102 (French W. Africa), & 125 (Spanish Guinea). Cd. 3300 (1907) & 114 S.P. 243 (New Hebrides) 86 S.P. 111. 92 S.P. 513. 106 S.P. 473.*

## Vacant and Unreserved Lands.

Land to which no valid claim can be shown, either on the part of individuals or of the community, or land which remains after the needs of native tribes have been provided for by adequate reserves, is at the disposal of the Government, and may, according to the law introduced by the new sovereign, become State property or remain open to appropriation by the first comer. The rule generally adopted is that such land becomes the property of the State, by whom it is allotted to settlers and others.

*Johnson v. M'Intosh, 8 Wheaton's Reps. 696. Bluntshill, § 277. E.g., 32 S.P. 915 (Uganda). Cd. 6606 (1913), p. 48 (Belgian Congo). F.O. Hand-books, Nos. 110 (Togoland) & 121 (Mozambique).*

The Southern  
Rhodesian  
'unalienated  
lands.'  
1919 A.C. 211.

The question of the ownership of 'unalienated lands' in Southern Rhodesia was referred by the British Government to the Judicial Committee of the Privy Council, who made their Report in 1919. The 'unalienated lands' in question consisted of all the lands which had not been granted by the British South Africa Company for white settlement, and comprised the native reserves, land in the Company's own occupation for ranching or other purposes, and land altogether waste and unsettled. There were three claimants to these 'unalienated lands,' namely, the Crown, the Company (whose administrative powers over the territory were shortly to be terminated), and the natives.

The Judicial Committee held that, although the Company had been concerned in the conquest of the territory from Lobengula, the conquest had been made on behalf of the Crown; that it was accordingly for the Crown, by virtue of the right of conquest, to deal with the land in the territory; that the grants that had been made by the Company had been made with the approval and assent of the Crown and on its behalf; that by sanctioning the making of those grants the Crown had assumed the ownership of the lands; and that all unalienated land belonged neither to the Company nor to the natives, but to the Crown. We have already noticed that the native reserves were subsequently vested in the High Commissioner for South Africa for the sole and exclusive use and occupation of the natives.

See above  
p. 343

#### Mines and Minerals.

Mines and minerals are frequently reserved to the Government, both in land granted to settlers and others and in lands owned by or reserved to the natives. Such action cannot be said to involve injustice to natives who themselves were not in a position to exploit the minerals. Where native lands are taken for mineral development, adequate compensation should be given to the owners, and should in general include other lands equally suitable in all respects for their purposes.

B.g. 92  
S.P. 1041  
(Soudan).  
98 S.P. 638  
(German  
S.-W. Africa).  
113 S.P. 97  
(Tanganyika).  
B.g.  
Rhodesia—  
88 S.P. 115  
92 S.P. 513.  
106 S.P.  
473 & 4.

#### Summary.

The conditions under which property is held among backward peoples are so varied, that any rules that are to apply to all cases will have to be in broad terms. But it appears to be justifiable to say that, while it is in the power of the sovereign to deal with, and regulate native property in, land in territory over which he acquires full dominion, the modern practice is

See e.g.  
E. African  
Commis-  
sion's  
Report,  
Cmd. 2287  
(1925),  
pp. 26 sq.

to respect individual rights of property, and to deal with communally-owned lands on the footing that land must be left to the natives in such quantities and of such quality as, in all the circumstances of their condition, is sufficient to enable them to maintain a reasonable standard of subsistence.

Where large areas are occupied by wandering tribes merely for hunting or grazing purposes, those tribes may be confined within reservations, provided the land left to them, and any other compensation given them, are sufficient in all the circumstances for their needs; and the remainder of the land may be taken for non-native settlement or exploitation. Where the aboriginal inhabitants have reached a more settled stage of development, the reservation system is usually inapplicable, and land required for settlement or other purposes must be purchased for a fair consideration.

It is legitimate, and often desirable, for the sovereign to secure to himself the exclusive right of pre-emption over such native lands as the owners may be prepared to sell. In any case, steps should be taken to prevent the natives from being despoiled of land that has been reserved to them or which is otherwise necessary to their existence and well-being.

Reserved or other lands in native occupation should not be expropriated, unless they are essential to the carrying out of the Government's policy of white settlement or exploitation, or are required for purposes of public utility; and only if adequate compensation is given to the natives, including other lands equally suitable in all respects for their purposes.

Vacant and unreserved lands are at the disposal of the sovereign; who may also reserve to himself the minerals in or under native or settled lands, and the right to authorize and regulate their exploitation.

It would perhaps be going too far to say that these rules are already rules of International Law. In his first edition, published in 1905, Oppenheim seems to have considered that rules protecting native property might properly rank as such, but in his second edition, published in 1912, the statement was modified. It is, however, difficult to see how the duties of trusteeship can be properly performed unless the rules which recognize native rights are in substance observed. Moreover, as we have seen, they are very generally adopted in modern colonial practice, so that, if all of them have not yet acquired a full legal sanction, violation of any of them would be a departure from well-established usage.

Are these  
principles  
rules of  
law?  
I. § 223.

See Transvaal  
Concessions  
Commission's  
Rep., 1901.  
Cd. 923, p. 7.

## CHAPTER XXXVIII.

### THE SLAVE TRADE, SLAVERY, AND CONDITIONS OF LABOUR.

#### The Slave Trade.

3 S.P. 971.  
10 S.P. 101.

*La Louis*  
(1817), 2  
*Dodson*, 251

*Madrazo v.*  
*Willis* (1820),  
3 Bern. &  
Ald. 363.  
*The Antelope*  
(1826), 10  
*Wheaton*, 66.

DECLARATIONS in favour of the prompt and complete abolition of the slave trade were made by the Congress of Vienna (1815) and the Congress of Verona (1822); but the Powers assembled in those Congresses were not in a position to fix a date from which the traffic should be regarded as universally illegal. At about the same time, the legality of the trade under International Law was upheld by the Courts in England and the United States, on the ground that, in spite of the declarations that had been made and the municipal laws that had been passed in reprobation of the traffic, some States still gave it the protection of their laws.

*E.g.*, 30  
S.P. 269 *sq.*

*The Berlin*  
*Confer-*  
*ence*.

In the period which intervened between the Congresses of Vienna and Verona and the Berlin Conference, further international treaties were made and municipal laws passed for the prohibition of the trade in various countries, and by the time the Conference met in 1885, the Powers represented were able to say that the slave trade was forbidden by International Law as recognized by them. The declaration was contained in Article 9 of the General Act, the full text of which is as follows :

C.-4739  
(1886).

Seeing that trading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers, and seeing also that the operations, which, by land or sea, furnish slaves to trade, ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin of the Congo, declare that these territories may not serve as a market or means of transit for the trade in slaves, of whatever race they may be. Each of the Powers binds itself to employ all the means at its disposal for putting an end to this trade and for punishing those who engage in it.

This Act was subscribed by the representatives of Great Britain, Germany, Austria-Hungary, Belgium, Denmark, Spain, the United States, France, Italy, Holland, Portugal, Russia, Sweden and Norway, and Turkey; and although the United States did not ratify it, that was not due to any disagreement of that Power with the statement in Article 9.

Wheaton,  
p. 100.

### *The Brussels Conference.*

In the Slave Trade Conference held in Brussels in 1889-90, the duty of suppressing the slave trade was considerably elaborated. The Conference was convened by the King of the Belgians at the suggestion of Great Britain. Its Final Act was ratified by all the States represented, namely, Great Britain, Germany, Austria-Hungary, Belgium, Denmark, Spain, the Independent State of the Congo, the United States of America, France, Italy, Holland, Persia, Portugal, Russia, Sweden and Norway, Turkey, and Zanzibar, although France made reservations in respect of Articles 21 to 23 and 42 to 61, dealing with the reciprocal right of visit and search, and the seizure and trial of suspected vessels.

81 S.P. 3.

C.-6557  
(1892) 76.

### *The Brussels Act.*

The Act deals in Chapter I (comprising Articles 1 to 14) with the measures to be taken to counteract the slave trade at its source in the interior of Africa.

C.-8049.1  
& 8557.  
82 S.P. 55.

The Powers undertake (Article 8) to proceed gradually and as circumstances permit with measures to this end, and declare (Article 1) that the most effective of these measures are the following: progressive organization of the administrative, judicial, religious and military services in the territories placed under the sovereignty or protectorate of civilized nations; the gradual establishment of fortified stations to exert a protective or repressive action in the territories devastated by man-hunts; the construction of roads and railways to the coast in order to provide a substitute for portage by men; the placing of steam-boats on the inland waters, supported by fortified posts on the banks; the establishment of telegraphic communication; the organization of expeditions and flying columns; and the restriction of the importation of fire-arms.

The interior stations and the cruisers on the inland waters are not only to prevent the capture of slaves and intercept slave routes, but also to serve, if necessary, as a place of refuge for

the native populations, to prevent tribal wars, and to form civilizing centres (Article 2).

Private associations wishing to co-operate in the repression of the trade are to be protected (Article 4).

The contracting Powers undertake to provide by their municipal laws for the punishment of slave-raiders and dealers and their accomplices. Guilty persons who may escape to other countries are to be arrested wherever found (Article 5).

Slaves liberated from a convoy are, if circumstances permit, to be repatriated; otherwise they are to be assisted to obtain a living. Fugitive slaves are to be received and protected in the official stations and on the Government vessels (Articles 6 and 7).

Articles 8 to 14 regulate the importation of fire-arms and ammunition into certain parts of Africa, and are considered in Chapter XLI of this work.

Chapter II of the Brussels Act deals with the measures to be adopted on the routes followed by the slave-dealers from the interior to the coast. Posts are to be established for intercepting the convoys and liberating the slaves. The departure for the interior of bands of man-hunters and slave-dealers is to be prevented. Caravans arriving at the coast or at inland places occupied by a Power are to be carefully inspected (Articles 15 to 19).

Chapter III (comprising Articles 20 to 61) relates to the repression of the slave trade by sea. A slave taking refuge on a ship of war of one of the Signatory Powers is to be freed; and a slave detained on a native vessel may be declared free. Rules are laid down to prevent the grant of the flag of one of the Signatory Powers to native slave-trading vessels; and to prevent native vessels flying such a flag from transporting slaves.

Chapter IV of the Act deals with the transport of African slaves to countries, whether in or out of Africa, belonging to those of the contracting Powers whose institutions recognize the existence of domestic slavery. Those Powers agree to prohibit, and take steps to repress, the importation, transit, and exit, as well as traffic in slaves. Fugitive slaves arriving at their frontiers are to be free (Articles 62 to 78).

Chapter V relates to the establishment of an international office for centralizing information of a nature to facilitate the repression of the slave trade by sea; to the exchange of information between the Signatory Powers; and to the establishment of offices for the protection of liberated slaves.

See the  
Munroe  
Dhows  
Award,  
88 S.P. 118.

Chapter VI of the Act deals with the traffic in spirituous liquors, and will be noticed in Chapter XL of this work.

Although the Act is concerned only with African slaves, it is not limited in its scope to Africa. Chapter IV expressly mentions countries to which African slaves may be sent outside Africa, and it was recognized at the Conference that the obligation to enact penal laws giving effect to the provisions of the Act extended to Powers who had no possessions or protectorates in Africa.

The Act  
not limited  
to Africa.  
C.-8049-1  
(1890) 66,  
77 & 78.

#### *Convention of St. Germain.*

For the States who have ratified the Convention of St. Germain-en-Laye of the 10th September, 1919, revising the Berlin and Brussels Acts, the detailed provisions mentioned above have been replaced by the general undertaking in Article 11 that 'They will, in particular, endeavour to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea.' For the other Signatory States, however, the provisions of the Berlin and Brussels Acts remain in force.

Cmd. 477  
(1919).  
See per Vin-  
cent Certi  
in H. of  
Lords  
16 Dec. 1925.  
See p. 234  
above for  
full text.

#### *The League of Nations Draft Convention.*

In this unsatisfactory position, and in the face of evidence that the slave trade is still practised openly in several Mohammedan States in Asia (in particular in the Arabian Peninsula, especially the Hedjaz), and that slave raids have not entirely disappeared in remote parts of Africa, the Sixth Assembly of the League of Nations in September, 1925, approved the terms of a Draft Convention for communication to all States Members of the League, and certain other States, with a view to its re-examination and signature at the time of the opening of the Seventh Assembly in 1926. The Draft Convention, as will be noted below, deals with slavery and compulsory labour as well as with the slave trade.

Report of  
L. of N.  
Slavery  
Com-  
mission,  
A. 19, 1925,  
VI.

L. of N.  
Paper, A.  
130, 1925,  
VI.

The Draft defines the slave trade as follows :—

The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

The slave  
trade  
defined.

It then goes on to provide that the High Contracting Parties, each in respect of the territories placed under its sovereignty,

jurisdiction, protection or tutelage, shall prevent and suppress the slave trade.

5 Geo. IV.,  
c. 113, s. 9.  
Story:  
*Commens-*  
*taries*, II.  
§ 1336.

The trade  
at sea.

By Great Britain and the United States, the transport of slaves by sea is treated as piracy. Difficulties were experienced when it was proposed to incorporate this principle in the Draft Convention, but the Draft proposes to bind the High Contracting Parties to adopt all appropriate measures for preventing and suppressing the trade at sea, and to give one another every assistance with the object of securing the abolition of slavery and the slave trade.

*The slave trade is forbidden by International Law.*

See Hall:  
Introduc-  
tion, p. 6.  
Snow,  
p. 161.

In view of the engagements, practice, and declarations of all the Powers interested in Africa, it is clearly now legitimate to say that the African slave trade is prohibited by International Law. Moreover, the principle having been so thoroughly established in this its most important application, it should, it would seem, apply universally. All the States who are members of the League of Nations have, indeed, undertaken in Article 23 of the Covenant 'to secure just treatment of the native inhabitants of territories under their control' without geographical limitation, and it would clearly be contrary to this undertaking for any of them to countenance operations of slave trading. In fact, the information obtained by the Temporary Slavery Commission of the League of Nations, who reported in July 1925, was to the effect that 'the slave trade is forbidden by law in all the States which are Members of the League of Nations and in their colonies, protectorates and dependencies (including territories held under mandate).'

On the whole, therefore, it can now be said that slave-trading operations anywhere are illegal for Members of the International Family. It appears to be possible to go even further and say that any State that claims to live up to the measure of its duties as a full Member of that Family should take any steps that it may find possible to hinder and prevent the trade wherever it may encounter it.

**Slavery.**

In respect of its prohibition by International Law, slavery does not stand in the same position as the slave trade. The problem of its abolition is complicated by the fact that, in addition to slavery as usually understood, there exist many

forms of domestic slavery and serfdom, of debt slavery and peonage. The Temporary Slavery Commission of the League of Nations reported that, while some forms of domestic or predial slavery or serfdom 'may imply the most abject servitude,' other forms may, on examination, be found to be 'rather a type of social organisation than a form of slavery as the latter term is currently used.'

Different forms of slavery. L. of N. Paper, A. 10, 1925, VI.

As regards municipal laws, the present position is summed up by the Temporary Slavery Commission as follows:—The legality of the status of slavery is not recognized in any Christian State (mother-country, colonial dependencies and mandated territories) except Abyssinia; and in Abyssinia edicts have been issued which, if put into force, would enable a large number of the slaves to recover their liberty, would assure to the others humane treatment, and would prevent future enslavements. China, Japan and Siam have also enacted laws forbidding or abolishing slavery; and the status of slavery is to-day recognized by law only in certain Asiatic countries, such as Tibet, and in most of the Mohammedan States of the East, such as Afghanistan, and the Hedjaz and other Arabian States.

Slavery under municipal laws. See also, 70 S.P. 341.

Domestic slavery or serfdom, the Commission found, is not legally recognized in the colonies or protectorates under the control of the different European nations, or in the mandated territories, although it might exist *de facto* but not *de jure*. In Abyssinia the institution is still officially tolerated, but the Government has expressed the intention of obtaining its gradual disappearance. It is also recognized in countries where slavery itself is legitimate.

Serfdom under municipal laws.

Internationally, the abolition of slavery has not formed the subject of such sweeping engagements as has that of the slave trade. The duty of assisting in its suppression was undertaken by the Powers in the Berlin Act and in the Convention of St. Germain. Moreover, for a Member State of the League of Nations to acquiesce in anything more than a temporary continuation of slavery, or anything approaching it, in territories under its control, would be contrary to the undertaking in Article 23 of the Covenant to which we have already referred. The admission of Abyssinia to the League in 1923 was made conditional on that country's acceptance of the obligations regarding the abolition of slavery, &c., in the first paragraph of Article 11 of the St. Germain Convention.

Slavery under International Law. See pp. 333-4 above.

The Signatories to the Brussels Act in 1890, however, did not ignore the fact that domestic slavery might then be recog-

Cmd. 2015 Pp. 34-6. See p. 334 above.

Art. 02.

Domestic  
slavery not  
absolutely  
illegal.

See p. 255  
above.

L. of N.  
Paper,  
A. 130,  
1925, VI.

'Slavery'  
defined.

Slavery  
legal only  
as an  
evanescent  
native in-  
stitution.

*Annuaire  
de l'Inst. de  
Droit Int.* X.  
194-5.  
C.-4381  
(1886), 217.

nized in the possessions of some of the Contracting Powers. And even the Mandates do not go so far as to demand the immediate suppression of domestic slavery where it may exist in mandated territory. Thus, the 'B' Mandates require that the Mandatory 'shall provide for the eventual emancipation of all slaves, and for as speedy an elimination of domestic and other slavery as social conditions will allow'—a direction with which may be compared the unconditional requirement in the same Article of these Mandates that the Mandatory 'shall suppress all forms of slave trade.' In the recent League of Nations Draft Convention, the relevant undertaking is put in the form: 'To bring about progressively and as soon as possible the disappearance of slavery in every form, notably in the case of domestic slavery and similar conditions'; and for the purposes of the Draft, 'Slavery' is defined as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'

Thus it does not appear to be justifiable to lay down as a general proposition that slavery in newly acquired territory is contrary to International Law. Since however, apart altogether from municipal laws against slave-holding, the capture and purchase of slaves are forbidden by International Law, none of the subjects of a colonizing Power can legally become slave-owners in a newly acquired possession; and if International Law does not go to the length of prohibiting slavery altogether in territory that has been acquired, or is in process of being acquired, by a member of the International Family, it recognizes it only as an evanescent native institution in cases where it previously formed part of the economic system of the natives.

#### Compulsory Labour for *Private Purposes*.

From the prohibition against the holding of slaves by non-natives and the extension of slave-holding in any form, it appears necessarily to follow that conditions which, in their practical effects, are indistinguishable from, or may result in, slavery, should not be set up under another guise: and this rule requires, in the first place, that any labour imposed upon the natives by the Government shall be for public purposes only, and shall be capable of performance without undue hardship.

Colonial  
practice.  
L. of N.  
Paper,  
A. 13,  
1925, VI.

The Temporary Slavery Commission reported that the principle of forced labour for private profit had 'been categorically condemned in almost all the European colonies and in all the mandated territories.' The Commission found no

trace of legislation authorizing compulsory labour for the benefit of private persons or private enterprises, save in certain cases where the natives were alleged to have insufficient means of support and might, in their own and in the general interest, be compelled to work for specified periods and under specified conditions.

The proposition that forced labour for private profit amounts to slavery has been definitely subscribed to by the British Government; and such compulsory labour has been declared by successive Colonial Secretaries to be 'absolutely opposed to the traditional policy of His Majesty's Government.'

Great Britain.  
\*

In their controversy with the Congo State, the British Government, in March 1908, expressed the opinion that the labour which had been exacted from the natives by concessionary Companies and devoted, not to objects of public utility, but to the furtherance of private interests, could 'only be expressed in unqualified terms as slavery pure and simple.' The Belgian Government, in their reply, did not dispute this principle, and pointed out that, under the draft Colonial Law for the Government of the Congo territory on its annexation by the Belgian State, the natives could not be forced, either directly or indirectly, with or without payment, to furnish their labour to concessionary Companies any more than to any other private enterprise. 'Labour can only,' they said, 'be voluntary, and on terms of payment agreed upon without the exercise of any pressure.'

The Congo State.  
Cd. 4135  
(1908), p. 34.  
Cd. 3002  
(1908), p. 4.

Cd. 4135  
(1908), p. 35.  
See 101  
S.P. 733.

On the whole, the present position as regards the compulsion of labour for private profit can hardly be better stated than in the terms employed in Article 6 of the League of Nations Draft Convention, which does not appear to go beyond the principles deducible from general law and practice. 'It is agreed,' runs the draft, 'that :

The present position ; and the League of Nations Draft Convention.  
L. of N. Paper, A. 130, 1925, VI.

(1) In principle, compulsory or forced labour may only be exacted for public purposes ;

(2) In territories in which compulsory or forced labour for other than public purposes still survives, the High Contracting Parties shall endeavour progressively and as soon as possible to put an end to the practice. So long as such forced or compulsory labour exists, the labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence.

\* *Anti-Slavery Reporter*, Oct. 1914. *Per* the Duke of Devonshire, *The Times*, 4 Oct., 1923. Cmd. 873 (1920), p. 4. Cmd. 2387 (1925), p. 37. Cmd. 2464 (1925), p. 15.

(3) In all cases, the responsibility for any recourse to compulsory or forced labour shall rest with the central authorities of the territories concerned.'

### Compulsory Labour for Public Purposes.

The principle of requiring temporary compulsory labour for public purposes is, however, generally admitted, provided the labour is limited in amount, is within the capacity of the natives, and is required to be rendered only under carefully devised and controlled conditions; and provided further (a) that necessary hired labour cannot be obtained on a voluntary basis, and the work is adequately remunerated; or (b) that the natives as a whole can be taxed in no other way with reasonable convenience to themselves and the authorities, and are allowed to commute their taxation in labour for a reasonable money payment; or (c) that the labour is levied and directed by the local native authorities, and 'the work benefits only the natives themselves and is intended to ensure the cleanliness and healthiness of the villages and their approaches, the upkeep of connecting tracks, &c.'

Od. 3002  
(1906), p. 4.

L. of N.  
Paper,  
A. 13,  
1925, VI.  
p. 12.

The  
Egyptian  
Corvée.  
Cromer:  
*Modern  
Egypt*,  
Ch. I.

When the British occupied Egypt in 1882, they found in operation an extensive system of forced labour for the necessary purpose of clearing the mud from the canals by which the land is irrigated from the Nile. In 1883, 202,650 men had to be called out for 100 days for this purpose. The Anglo-Egyptian Government at once set itself the task of abolishing this system, and, after a struggle extending over eight years, succeeded in finding the large sums necessary to pay for the free labour required.

The Mala-  
gasy  
Corvée.  
89 S.P.  
1042.

When the French took possession of Madagascar in 1895-6, they could not see their way at once to abolish the corvée which had been in force under the native Government. But, regarding it as a tax, they took steps to put an end to its abuses, to distribute its burden equitably, and to limit its employment to purposes of public utility.

### Taxation in labour.

Od. 4135,  
p. 5.

The principle that 'there is nothing wrong in taxation in labour any more than in any other particular form of taxation' was agreed to by the British Government during their controversy with the Congo State. What His Majesty's Government then complained of was 'the abuses to which a tax in

labour is liable to give rise,' and which, they said, had actually arisen in the case of the Congo. 'Taxation in labour,' continued the British memorandum of March 1908, 'is an expedient to which His Majesty's Government, as well as other Powers possessing Colonies in Africa, have on occasions resorted when no other form of taxation was possible. There is, however, this difference in the application of the principle, that in the case of the British Colonies taxation in labour has never been regarded as more than a provisional and temporary expedient, to last only until such time as it might be possible to introduce a more satisfactory system.'

*Independent State of the Congo.*

The British Government further admitted that the provisions of the Congo Government's Decree, requiring every adult and able-bodied native to render forty hours' labour a month were, 'as they read on paper,' unexceptionable, particularly as the Decree provided that the labour was to be remunerated. The British Government showed, however, that the law was administered in such a way that its actual operation bore no just relation to its terms, and resulted in the infliction of great hardship and cruelty, and the establishment of conditions which differed only in name from slavery.

In the first place, the British Government laid stress upon the fact that the tax was not actually levied in terms of hours' work, but of quantities of rubber, foodstuffs, and other produce which were considered by the Authorities to be the equivalent of forty hours' labour a month. The collection and preparation of the produce demanded, however, required very much more than this amount of labour; and in some cases almost the whole of the time of the natives, sometimes both of the men and the women, was absorbed in procuring the quantities of produce which they were compelled to furnish.

Secondly, Great Britain complained that the natives were deliberately deprived of any opportunity of discharging their taxes in any other form. The Administration had not only refrained from introducing currency, but had appropriated, for itself or its concessionaires, the whole of the land and its natural products, so that the natives were left with nothing but their labour wherewith to pay their taxes.

Thirdly, with reference to the provision in the Decree for the remuneration of the natives for the labour rendered, it was

Ord. 4135  
(1908).  
*See also*  
Ord. 1764 &  
1809 (1903);  
1933 & 2097  
(1904);  
2333 (1905);  
3002 (1906);  
3450 (1907);  
3880, 4079,  
4178 & 4896  
(1908); 4486  
& 4701  
(1909); 5559  
& 5960  
(1911); 6145  
(1912); 6508  
& 6902  
(1913).

pointed out that such payments as were made for the produce brought in were so much below its market value that the difference amounted to a very heavy tax, while it was further objected that the payments were frequently made in the form of commodities unsuited to native requirements.

Od. 4178  
(1908).  
Conditions  
improved  
under  
Belgian  
Govern-  
ment.

Here again, the Belgian Government, when about to annex the Congo territory, recognized the validity of the principles underlying the British protests. They agreed that the taxation of the natives should be on a moderate scale, and in proportion to the circumstances of the taxpayers; and that the labour tax required from natives who were unable to pay their taxes in money should be only a temporary and provisional measure, destined to disappear gradually with the introduction and increased circulation of currency, which the Government promised to make every effort to encourage. This promise was redeemed by the Belgian Decree of May 1910, which taxed the adult male natives in money varying in amount according to the resources and degree of development of the populations of the various areas.

104 S.P.  
768 & 788.

### *Other examples of permitted forced labour.*

League of  
Nations  
Mandates.  
See  
Ch. XXVI.  
*above*.

While the Mandates of the League of Nations do not contemplate the use of forced labour for purposes of taxation, the 'B' and 'C' Mandates do not entirely rule it out 'for essential public works and services,' but it is to be employed 'only for adequate remuneration.'

Dutch East  
Indies.  
F.O. Hand-  
books,  
Nos. 82, 84  
& 86.

In the Dutch East Indies, where forced labour was at one time common but has now almost disappeared, it may be required in some Residencies for the construction and maintenance of roads, bridges, irrigation works, dykes, court-houses and other public services. But it must be paid for; and in no district may the number of days' labour required exceed fifty-two per annum, while in most cases the limit is lower, e.g. twenty-four or twenty-six.

Kenya.  
Cmd. 2464  
(1925).  
See also,  
Cmd. 873  
(1920).

By a Kenya Ordinance of 1922, the natives may be required to work, for payment, for any of the following purposes :—

Urgent repairs in case of sudden or unforeseen damage to roads or railways or to Government buildings or works, or for the purpose of preventing loss of life or damage to property from fire, flood or other unforeseen cause;

As porters for Government servants on tour and for the transport of urgent Government stores;

The construction and maintenance of such public works as roads, bridges, waterworks, railways, government buildings, harbour works, wharves and piers, and telegraph and telephone systems.

But no person is to be required to work (a) for a longer period than sixty days in any one year, or (b) if he be fully employed in any other occupation or has been so employed during the preceding twelve months for a period of three months. Moreover, the Colonial Authorities, before compelling labourers under the Ordinance, are to obtain the authority of the British Colonial Secretary in respect of specified work for a specified period; and the recent case in which a limited number of labourers were allowed to be compelled for urgent railway construction shows that such authority is not given lightly.

Cm'd. 2464  
(1926).

### Supervision of Private Contract Labour.

The prohibition against the extension of slave-holding also requires that the Government shall supervise the private recruitment of labour. This duty is recognized in the Brussels Act, Article 2 of which provides that the stations, cruisers and posts to be organized by the various Powers shall, independently of their principal task of repressing the slave trade, have (among others) the following subsidiary duties:

Sidgwick:  
*Politics*,  
XVIII, § 8.

C.-6049-1  
(1890).

To give aid and protection to commercial undertakings; to watch over their legality by controlling especially contracts of service with natives.

Most of the Colonial Powers have taken steps, in a more or less thorough manner, for the supervision of the recruitment and treatment both of indigenous and of imported labourers. The regulations that have been made in the various cases have been directed to such objects as securing that only proper persons are employed as recruiting agents; that the terms of the contract of service shall be thoroughly understood by the labourer before he binds himself, and that he signs of his own free will; and that the labourer shall be properly cared for both in health and sickness. They have also dealt with such questions as the employment of women and children; the maintenance of discipline among the labourers; the hours to be worked; the payment of wages; the settlement of disputes between the employers and the labourers; and the conditions affecting the termination of the service.

Objects of  
National  
Regulations.

See e.g.  
78 S.P. 57  
(Fiji).

78 S.P.  
447-520  
(French  
Colonies).

100 S.P.  
527-36;  
114 S.P.

244 (New  
Hebrides).

104 S.P. 774  
(Belgian  
Congo).

106 S.P.

348-434

(Angola, etc.).

Cm'd. 2387  
(1926), pp. 36 sq.  
(Brit. E. Africa)

Making,  
of. en-  
forcing.  
Regula-  
tions.

106 S.P.  
356 & 367.

F. O. Hand-  
book, No.  
119, p. 22.  
110 S.P.  
857.

But regulations, however excellent in themselves, are of little value if they are disregarded by the local authorities concerned, and, as was pointed out by the British Government in their discussion with the Portuguese Government regarding the contract labourers in San Thomé and Príncipe, it is the duty of the Home Government to see that its regulations are thoroughly enforced. Portugal afterwards gave effect to this principle in the islands mentioned. Also in conformity with the principle is the French Decree of September 1908, which provides that the Commission of Control in the French Congo shall ascertain that labour contracts made by concessionary companies are in accordance with the legislation in force, and shall supervise their execution.

## CHAPTER XXXIX.

### PERSONAL SAFETY OF THE NATIVES.

#### *The native at home.*

In the early stages of the government of backward territory, the only method of bringing unruly tribes to reason and maintaining order in outlying parts of the territory may be by way of punitive military expeditions directed against a tribe or district as a whole, without its being possible to distinguish between innocent and guilty individuals. But the requirement of 'Effective occupation' clearly involves the duty on the part of the acquiring State of taking steps to secure the administration and policing of the whole territory under its full sovereignty or protection so as to render it possible, within a reasonable time, to mete out punishment to the guilty individually.

Punitive  
Expedi-  
tions.

This duty is emphasized in the Instructions which the British and French Governments sent to their respective High Commissioners in the New Hebrides after assuming the condominium over those islands in 1906. 'Formerly,' ran the Instructions, 'their operations [i.e., the operations of the Joint Naval Commission] were purely in the nature of "acts of war" against the tribes; they restored order by summary demonstrations intended to impress the natives, who could be neither arrested nor tried in the legal sense of the word. Their functions were at an end as soon as warlike operations were completed. Henceforth their intervention will be within more clearly defined limits; it will be a question only of dealing with individual natives who have committed outrages, not, it is hoped, of punitive expeditions against a tribe or tribes.'

100 S.P.  
622.

The requirement of 'Effective occupation' and the duties of 'Trusteeship,' moreover, alike demand the existence in the territory of an authority capable of protecting the natives in their persons and property. Even a protecting Power, without necessarily interfering unduly with the native courts, will be expected to ensure that a reasonable measure of justice is

Protection  
of indi-  
vidual  
natives.  
E.g. 86  
S.P. 290  
(Uganda).

Hobart :  
(1st Edn.),  
p. 515.  
3 & 4 Will.  
IV. c. 85.

available to individuals. 'Justice,' said the East India Company in explaining the provisions of the Government of India Act, 1858, to the Government of India, 'is to be distributed to men of every race, creed, and colour, according to its essence, and with as little diversity of circumstances as possible.'

*The native abroad.*

Hall :  
*Foreign  
Powers, etc.*  
§ 100.  
Westlake,  
I. Ch. X.  
39 & 40  
Vict. Ch. 40  
(Preamble),  
108 S.P.  
1024 & 1034.

When abroad, the indigenous inhabitants of annexed or protected territory should, it would seem, be treated by the sovereign or protecting State as its subjects. In the case of a territory that has been fully annexed, this proposition is not likely to be denied. And since a protected people have renounced in favour of the protecting Power all direct intercourse with other States, the duty of looking after the interests of their members abroad would seem necessarily to devolve upon the protecting State, by whom alone it can be performed. In the case of the protected Princes of India, the obligation has been expressly accepted in an Act of the British Parliament; and both France and Spain have undertaken a similar obligation in respect of Moroccan subjects originating in their respective zones in Morocco.

## CHAPTER XL.

### THE LIQUOR TRADE.

THE benefits which have been conferred upon native populations by European control have, in many cases, been seriously counteracted by the degrading effect upon the natives of the intoxicating liquors which have been introduced with the higher civilization, and a realization of this fact has led to the adoption of regulations intended to prevent or restrict the supply of liquor to the natives.

*See Portuguese Circular of 13 Apr. 1898. 85 S.P. 709. And see p. 329 above.*

The question, which had been dealt with by numerous municipal regulations in various countries, was considered by the Berlin Conference, but no provisions dealing with it found a place in the Final Act. At the Brussels Conference, restrictive rules were incorporated in the General Act, of which they formed Chapter VI.

*The Berlin Conference.*

*The Brussels Act. C.-6049-1 (1890), 34, 70 sq., 188.*

This Chapter stated that the Signatory Powers, 'justly anxious about the moral and material consequences which the abuse of spirituous liquors entails on the native populations,' had agreed to apply the following provisions within a zone extending over the full width of the African Continent from 20° North to 22° South, including the islands within 100 sea miles from the shore.

In those regions of the zone where, from religious or other motives, the use of spirituous liquors did not exist or had not been developed, their importation and manufacture were prohibited, except for consumption by the non-native population. In other parts of the zone, customs and excise duties upon spirituous liquors were provided for at fixed minimum rates. These rates were progressively raised by the Conventions of the 8th June, 1899, and the 8rd November, 1906.

*For Municipal Regulations see 84 S.P. 342-452. Cd. 108 (1900), & 8853 (1907).*

These provisions have now been replaced, for such of the Powers as have ratified or may ratify the Convention, by the Liquor Traffic Convention which was signed at St. Germain-en-Laye on the 10th September, 1919, and which applies to the

*The St. Germain Liquor Traffic Convention.*

112 S.P.  
925.  
Cmd. 478  
(1919).

territories which are or may be subjected to the control of the Signatory Powers throughout the whole of Africa (with the exception of Algeria, Tunisia, Morocco, Libya, Egypt and the Union of South Africa), and also to the islands lying within 100 sea miles of the coast.

Throughout this area, the Convention prohibits the importation, distribution, sale and possession of trade spirits of every kind, and of beverages mixed with these spirits, as also of distilled beverages containing essential oils or chemical products which are recognized as injurious to health. In those regions within the area where the use of spirituous liquors has not been developed, their importation, distribution, sale and possession are to be prohibited, except as regards limited quantities destined for the consumption of non-native persons and imported under special conditions. All distilled beverages imported are to be subject to an import duty of not less than 800 francs per hectolitre of pure alcohol, or, in the case of the Italian colonies, 600 francs.

The manufacture of distilled beverages of every kind is forbidden in the area in question, except in the Italian colonies where an excise duty equal to the prescribed import duty is to be imposed. The restrictions are not to apply to imported or manufactured pharmaceutical alcohols required for medical, surgical or pharmaceutical establishments.

The Convention further prohibits (except as regards the Italian colonies) the importation of stills and other distillation apparatus, except under conditions designed to prevent their use for the production of alcoholic beverages.

A Central International Office is to be established, under the control of the League of Nations, for the purpose of collecting and preserving documents with regard to the importation and manufacture of spirituous liquors under the conditions referred to in the Convention; and each of the High Contracting Parties is to publish an annual report showing the quantities imported or manufactured and the duties levied.

See e.g.  
Cmd. 1795.

*L'Institut  
de Droit  
Internat.  
Ronal.  
X. Ann.  
204.*

As far back as 1888, *L'Institut de Droit International* suggested a rule to deal with the matter in the following terms:

Le débit des boissons fortes sera réglementé et contrôlé de façon à préserver les populations indigènes des maux résultant de leur abus;

and the duty of taking effective steps to protect the backward races under their control from the special evils attending the use of alcoholic beverages would probably now be admitted by

the Colonial Powers, even as regards territory outside the areas covered by the Brussels Act or the St. Germain-en-Laye Convention. Thus, while the Union of South Africa is excluded from the scope of that Convention, the Act of the British Parliament which constituted the Union provides that the sale of intoxicating liquors to natives shall be prohibited in any native territories the government of which may be transferred to the Union by the King ; and similar prohibitions have been introduced in such places as Fiji and the New Hebrides.

9 Ed. VII.  
c. 3, s. 151  
& Schedule  
§ 15.

85 S.P. 262.  
100 S.P. 524.  
114 S.P. 264.

## CHAPTER XLI.

### THE ARMS AND AMMUNITION TRADE.

**The  
Brussels  
Act.**  
C.-6557  
(1892).  
*See hereon*  
*'Sergent*  
*Malamino'*  
Award,  
95 S.P.  
141-2.

THE Brussels Act of 1890, after reciting in Article 8 that the experience of all nations who have intercourse with Africa has shown 'the pernicious and preponderating part played by firearms in Slave Trade operations, as well as in intestine wars between native tribes,' and that this same experience has clearly proved 'that the preservation of the African populations, whose existence it is the express wish of the Powers to safeguard, is a radical impossibility if restrictive measures against the trade in firearms and ammunition are not established,' proceeds in Articles 8 to 14 to prohibit the importation of fire-arms and ammunition into a certain zone of Africa, except under special safeguarding regulations.

**The St.  
Germain  
Arms Con-  
vention.**  
112 S.P.  
909.  
Cmd. 414  
(1919).  
Cmd. 2015,  
pp. 20 & 35.

These particular Articles were intended to be replaced by the more extensive and detailed provisions of the Arms and Ammunition Convention of St. Germain-en-Laye of the 10th September, 1919. That Convention, however, was ratified by only a few of the Signatory States; although it has been observed in practice by arrangement between the principal interested Powers, pending reconsideration of the whole question of the international trade in arms and ammunition under the ægis of the League of Nations.

**The  
Geneva  
Con-  
vention.**  
L. of N.  
Paper C.O.  
1 A. 91 (2).  
*Monthly  
Summary  
of the L. of  
N., Vol. V.*  
p. 144.

The League of Nations Conference, which met at Geneva during May and June 1925, drew up a Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, which provides for the abrogation of the provisions of earlier international Conventions relating to the matters with which it deals. This Convention was signed (subject to ratification) on the 17th June by, among other States, the following Colonial Powers, namely, the British Empire, France, Italy, Japan, Spain, and the United States of America.

The part of the Convention which is more particularly con-

cerned with backward territory is Chapter III, for the purposes of which a Land Zone and a Maritime Zone are defined as follows :

The Land Zone includes the whole of Africa, except Egypt, Libya, Tunisia, Algeria, the Spanish possessions in North Africa, Abyssinia, the Union of South Africa with the territory under its mandate, and Southern Rhodesia. The zone also includes the islands within 100 marine miles of its coast, and Principe, St. Thomé, Annobon and Socotra (but not the Spanish islands north of 26° North latitude), as well as the Arabian Peninsula, Gwadar, Syria and Lebanon, Palestine and Transjordan, and Iraq. Abyssinia, although excluded from the zone, specially undertakes to carry out within its territory the provisions of the Convention relating to the export, import and transport of the regulated articles.

The Maritime Zone comprises the Red Sea, the Gulf of Aden, the Persian Gulf and the Gulf of Oman.

The Convention provides that arms, ammunition and implements of war, in specified categories, including gunpowder and explosives (except common black gunpowder), shall be exported to and imported into places within the defined zones only after special steps have been taken to ensure that the articles are required for lawful purposes. The trade in, the transit of, and the manufacture, assembly, and repair of controlled articles within the zones are to be placed under special supervision in order to prevent the articles from falling into unauthorized hands. Elaborate provisions are included for preventing the illicit conveyance of such articles within the zones by native vessels. Special returns of controlled articles exported to territory within the zones are to be published quarterly.

## CHAPTER XLII.

### NATIVE RELIGION, LAWS, CUSTOMS AND INSTITUTIONS.

It is becoming more and more generally recognized that, in conferring upon backward races some of the advantages of modern civilization, it is not necessary, nor as a rule desirable, to force a great change upon them abruptly; and that the process is usually more likely to be hindered than helped by destroying their institutions, imposing upon them institutions which have been evolved to meet the exigencies of an advanced civilization, sweeping away the sanctions of their established customs, or hampering them in the exercise of their religion. Practices of an inhuman or grossly immoral nature no civilized Power would tolerate under its rule. A drastic change in the penal system is, moreover, sometimes necessary in the interests of order and good government. But apart from such matters, the modern tendency has been, although examples to the contrary are not wanting, to leave the natives inhabiting the colonial possessions of European Powers under the régime of their own laws and customs, to preserve to them their institutions, and protect them in the exercise of their religion, and to educate them gradually to such progressive ideas and methods as may be suitable to their condition.

Ridgce,  
Pt. VI. II.

F.O. Hand-  
book No.  
114, pp. 2  
& 20.

And where an opposite policy has been adopted, it has been generally recognized as improper and contrary to the usual colonial practice. Thus it was one of the charges brought against Germany in respect of her colonial administration that she had 'disregarded native laws and customs, broken up certain tribes,' and degraded the native chiefs.

*The Incas.*

In view of the fact that anything like a general recognition of this principle dates from comparatively recent times, it is interesting to note that it was put into practice in America before a European had set foot upon the continent. 'The Incas,' says Sir Clements Markham, 'respected the organisations they found among the people who came under their rule,

*The Incas,*  
Ch. XI.

and did not disturb or alter the social institutions of the numerous tribes they conquered. Their statesmanship consisted in systematising the institutions which had existed from remote antiquity, and in adapting them to the requirements of a great empire.

Turning to the evidence of the modern acceptance of the principle, we will first quote again from the comments of the East India Company to the Government of India on the Government of India Act 1838. 'Whatever may be the prejudices of Englishmen,' it runs, 'we strongly deprecate the transfer to India of all the peculiarities of our criminal judicature. We are not satisfied that these peculiarities are virtues. There is no inherent perfection in the number twelve [for a jury], nor any mysterious charm in an enforced unanimity of opinion; and legislating for the Indian people, we should be apt to seek for precedents in the ancient usages of India, rather than in the modern practice of England.'

The East  
India  
Company.

Ilbert (1st  
Edn.), 518.

In extending her rule over backward peoples, Great Britain has in general left them under the régime of their own laws and customs, so far as those laws and customs have been compatible with justice, humanity and good government.

Great.  
Britain.

The Conventions of 1906 and 1914 provide for the observance of similar principles in the execution of the Anglo-French condominium over the New Hebrides.

The *Exposé des Motifs* introducing the French *Projet de Loi* for declaring Madagascar a French Colony in 1896, contained the following statements:—

France in  
Mada-  
gascar.  
80 S.P.  
1058.

Prémuni contre les inconvénients et les périls de toute nature qui résulteraient d'une immixtion trop directe dans les affaires du pays et les excès du fonctionnarisme, le Gouvernement n'entend nullement porter atteinte au statut individuel des habitants de l'île, aux lois, aux usages, aux institutions locales.

Il est également conforme aux précédents appliqués par un certain nombre de Puissances Coloniales et par la France elle-même que, dans l'administration intérieure, l'autorité de pouvoirs indigènes puisse être utilisée.

The principle underlying the Belgian Decree of May 1910, for the taxation of the natives of the Congo was, according to the Colonial Minister, 'de faire administrer le nègre par son

Belgium  
in the  
Congo.  
104 S.P.  
788 & 784.

\* F.O. Handbook, No. 96, p. 61, and s.g. 15 & 16 Vloth. Ch. 72, s. 71 (*New Zealand*).  
106 S.P. 498 (*N. Rhodesia*), 106 S.P. 580 (*Nigeria*).

† Cd. 3300 (1907). F.O. Handbook, No. 144, p. 38. 114 S.P. 217.

chef légitime et de respecter la coutume dans ce qu'elle a de conciliable avec l'intérêt public et avec le droit supérieur de la civilisation.'

Italy on  
the Red  
Sea and in  
Tripoli.  
73 S.P.  
1938.

The Italian Law establishing a colony at Assab in 1882 provided that the religious beliefs and practices of the native races were to be respected; and that in matters relating to their personal status, family relations, marriages, successions to property, and all matters of private rights, they were to remain under their own laws so far as such laws were not repugnant to universal morality and public order. The Italian Decree of October 1912 conceded to the inhabitants of Tripolitania and Cyrenaica, 'as in the past, the fullest liberty in the exercise of the Mussulman faith,' and provided for respect being paid to local customs and usages.

106 S.P.  
1080 &  
1090.

Russia and  
Holland.  
Reinsch, Chs.  
VIII. & XVII.  
F.O. Hand-  
books, Nos. 82  
& 84.

By the Russians in Central Asia, and by the Dutch in the East Indies, native institutions have been protected and utilized.

Treaties with  
natives.  
72 S.P. 1106.

These principles have frequently figured in the treaties by which European sovereignty has been accepted by less advanced peoples. 'The free exercise of our religion and customs' was stipulated for by the Sultan of Sulu in the treaty by which he recognized Spanish sovereignty over the Archipelago in 1878. In the treaty with the Princes and Chiefs of Kacougo and Massabe in 1888, Portugal agreed to respect and cause to be respected 'the usages and customs of the country.' In a large number of treaties made with various kings and chiefs, the Royal Niger Company bound themselves 'not to interfere with any of the native laws or customs of the country, consistently with the maintenance of order and good government.'

75 S.P. 810.

O.-0372  
(1899).

British  
Company  
Charters.  
15 Hertlet,  
85.  
17 ib. 118.  
18 ib. 82 &  
134.

The same principles have been enjoined upon the great chartered Companies in regard to the powers of administration with which they have been entrusted. To quote from the charter of the British South Africa Company—which is typical in this respect of the charters of the other three great British Colonial Companies of the same period—Article 18 provides as follows:—

The Company as such, or its officers as such, shall not in any way interfere with the religion of any class or tribe of the peoples of the territories aforesaid or of any of the inhabitants thereof, except so far as may be necessary in the interests of humanity, and all forms of religious worship or religious ordinances may be exercised within the said territories, and no hindrance shall be offered thereto except as aforesaid.

And Article 14 lays down that :—

In the administration of justice to the said peoples or inhabitants careful regard shall always be had to the customs and laws of the class, or tribe, or nation to which the parties respectively belong.

The Covenant of the League of Nations lays down that the Mandatory under what has come to be called a ' Class B ' or a ' Class C ' Mandate ' must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals ' ; and a similar provision has been inserted in the ' Class A ' Mandates.

The  
League of  
Nations.  
See  
Ch. XXVI.  
above.

These examples will serve to show to what a wide extent the principle of preserving to the natives their own laws, customs and religion has been observed in practice. As we have seen, the Berlin Act expressly guaranteed freedom of conscience and religious toleration to the natives in the Conventional Basin of the Congo. Article 11 of the Convention of St. Germain would appear, by implication, to extend the same freedom and toleration to all parts of Africa over which the Signatory Powers have control ; and so much would doubtless be conceded in the possessions of all the Colonial Powers, so long as it was not made a cloak for inhuman practices or seditious agitation. Further, the duties of ' Trusteeship ' would appear to require that there shall be no interference with native religion, laws, customs and institutions that is not called for in the interests of humanity or of the advancement or good government of the natives themselves.

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